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INTRODUCTORY STATEMENT.

By Chapter 223 of 1919, the Judicature Commission was created:

> "To investigate the judicature of the commonwealth with a view to ascertaining whether any and what changes in the organization, rules and methods of procedure and practice of the several courts, the number and jurisdiction thereof, and the number and powers of the judges therein, and of the officers connected therewith, would insure a more prompt, economical, and just dispatch of judicial business."

Hon. Henry N. Sheldon and Messrs. George R. Nutter, of Boston, and Addison L. Green, of Holyoke, were appointed to this commission and entered on their work in October, 1919.

The first report of the commission recommending procedure in the district courts for the collection of small claims, not exceeding $35, was submitted to the legislature in January, 1920. This report was reprinted in the February number of the MASSACHUSETTS LAW QUARTERLY for 1920. The act recommended by the commission, with slight changes, was adopted by the legislature and went into effect on January 1, 1921.

On January 5, 1921, the second and final report of the commission was filed with the legislature.

As the members of the bar in different parts of the state will be interested in this report, which contains a general discussion of the judicial system of the state with a number of recommendations in regard to it and the practical reasons upon which these recommendations are based, reprints have been obtained from the state printer and bound up as a special number of this magazine for the information of the bar.

As the rules adopted by the justices of the district courts for the small claims procedure will interest the profession, reprints of these rules, which are now in operation, are also bound up herein as a sequel to the first report of the Judicature Commission.

F. W. G.

Entered as Second-Class Matter at the Post Office at Boston.

HOUSE No. 1205

SECOND AND FINAL

REPORT

OF THE

JUDICATURE COMMISSION

APPOINTED UNDER CHAPTER 223, GENERAL ACTS OF 1919.

JANUARY, 1921

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CONTENTS.

The Commonwealth of Massachusetts

GENERAL ACTS OF 1919, CHAPTER 223.

AN ACT TO PROVIDE FOR A COMMISSION TO INVESTIGATE THE JUDICATURE OF THE COMMONWEALTH.

Be it enacted, etc., as follows:

SECTION 1. The governor, with the advice and consent of the council, shall appoint a commission of three persons to investigate the judicature of the commonwealth with a view to ascertaining whether any and what changes in the organization, rules and methods of procedure and practice of the several courts, the number and jurisdiction thereof, and the number and powers of the judges therein, and of the officers connected therewith, would insure a more prompt, economical, and just dispatch of judicial business. The commission shall be known as the "judicature commission", and shall report its conclusions to the general court, on or before the first Wednesday in January, nineteen hundred and twenty, with drafts of any legislation which it may deem expedient. The commission shall report to the governor, when so requested, as to the progress of its work.

SECTION 2. The commission may give public hearings, shall have power to administer oaths and to require the attendance of witnesses and the production of books and documents, and may cause a stenographic report of the proceedings before it to be made. A witness who gives false testimony or who fails to appear when duly summoned shall be subject to the same penalties to which a witness before a court is subject.

SECTION 3. No member of said commission shall receive any compensation for his services, but the commission and the several members thereof shall be allowed from the state treasury such expenses for clerical and other services, travel and incidentals, as the governor and council shall approve, not exceeding such sum as the general court may appropriate. The commission may avail itself of the services of the department of the supervisor of administration. [*Approved June 10, 1919.*

ACTS OF 1920, CHAPTER 194.

AN ACT TO EXTEND THE TIME WITHIN WHICH THE SPECIAL COMMISSION TO INVESTIGATE THE JUDICATURE OF THE COMMONWEALTH SHALL FILE ITS FINAL REPORT.

Be it enacted, etc., as follows:

The time within which the special commission, appointed under the provisions of chapter two hundred and twenty-three of the General Acts of nineteen hundred and nineteen, to investigate the judicature of the commonwealth is required to file its final report is hereby extended to the first Wednesday in January, nineteen hundred and twenty-one. [*Approved March 24, 1920.*

SECOND AND FINAL REPORT OF THE JUDICATURE COMMISSION.

To the Honorable Senate and House of Representatives.

I.

1. Introduction.

In an address delivered at the meeting of the American Bar Association in Boston in September, 1919, on the judicial system of the Province of Ontario, Mr. Justice Riddell of the Supreme Court of Ontario made a statement which deserves the serious consideration of lawyers and laymen. He said: —

> We . . . regard the courts . . . as a business institution to give the people seeking their aid the rights which facts entitle them to, and that with a minimum of time and money. We are a poor and a busy people. We cannot afford to waste either time or money.

These few simple words seem to express the primary purpose of a judicial system in Massachusetts, and to furnish the practical tests to be applied by this Commission in studying the existing system of Massachusetts under chapter 223 of the General Acts of 1919, quoted at the beginning of this report.

The Course of Inquiry followed by the Commission.

A preliminary report was made by the Commission in January, 1920, containing a single recommendation for the establishment of a simple and inexpensive procedure in the district courts for the collection of small claims, and this recommendation was adopted by the Legislature with slight changes by chapter 553, Acts of 1920, which goes into effect on Jan. 1, 1921. By chapter 194, Acts of 1920, the time for the final report of the Commission was extended to January, 1921, and that report is now submitted.

The scope of the inquiry was not limited by the act, but the magnitude of the subject and the fact that a report was called for in less than a year and a half from the time that the Commission was appointed and qualified indicate that there were some unexpressed limits to the extent of the inquiry. Accordingly, the Commission has felt obliged to exercise its judgment as to the nature and extent of the investigation in order to keep within its appropriation and to prepare a report within the time set which might contain suggestions and recommendations likely to be of assistance to the Legislature, the courts and the public in considering the problems involved.

While the act authorized a stenographic report of hearings before it, the Commission has seen no occasion for such expense. As stated in the previous report, public hearings were held in Boston and Springfield and widely advertised, and some suggestions were then received. Other hearings were held in Pittsfield, Greenfield and Northampton. These hearings were well attended. Many suggestions have been received in writing, and various aspects of the problem have been discussed informally with many men, including judges and lawyers of varied experience. The history of the Massachusetts courts, and of the legislation in regard to them, and the reports of other commissions and legislative committees have been examined, and also many discussions of judicial organization and administration in other jurisdictions.

From this mass of discussion and information, as well as from their own experience and observation, the Commissioners have endeavored to select those ideas which they believe to be of practical value and capable of adaptation to Massachusetts conditions, and to formulate them for public consideration.

As the administrative side of legal procedure is to a considerable extent a business question, which can be understood by laymen, we begin this report with a description of the present system, a general statement of the cost of the administration of justice throughout the Commonwealth, and a brief discussion of the results gained, before taking up measures for reducing what we believe to be a waste of judicial power at both public and private expense.

2. The System of Massachusetts To-day.

For the information of laymen, a brief statement of the system of courts and officers connected with them may be of assistance in considering this report.

We have a Supreme Judicial Court of seven judges exercising appellate jurisdiction and original jurisdiction in equity and in regard to prerogative writs, and also certain special statutory jurisdiction, such as appeals from the Public Service Commission. The justices are also charged by the Constitution with the duty of rendering advisory opinions to the Legislature or the Executive Department. This court has had a continuous existence since 1699, and has been one of the three co-ordinate parts of the constitutional structure of the State government since 1780.

We have a Superior Court created in 1859 now consisting of twenty-eight judges exercising legal and equitable jurisdiction in most matters, civil and criminal. This is the great trial court in which practically all jury trials take place.

We have the Land Court, created in 1898, of two judges dealing with the now fully developed and increasing business of land registration, as well as with the various forms of actions relating to land which have been transferred to that court under the statutes passed since 1898. This court, in cases in which a jury trial is claimed, frames issues and sends them to the Superior Court for trial.

The probate courts are county courts of general and superior jurisdiction, with jurisdiction in equity concurrent with the Supreme Judicial and the Superior Courts in some matters. Under the recent chapter 274, Acts of 1919, the probate court has jurisdiction on the facts similar to that of the Superior Court in equity cases, and appeals from the probate court go directly to the full bench of the Supreme Judicial Court in the same manner and subject to the same rules as appeals in equity from the Superior Court. Jury issues are framed in the probate court and sent to the Superior Court for trial, subject to interlocutory appeals (upon the granting or refusal of issues) directly to the full bench.

The Municipal Court of the City of Boston consists of nine justices and four special justices, with an appellate division from which a further appeal lies to the full bench of the Supreme Judicial Court. Its civil jurisdiction is limited to cases not exceeding $2,000. It has no equity jurisdiction. The bringing of a case in that court constitutes a waiver of a jury trial by a plaintiff, and, if a defendant claims a jury, he removes the case at once to the Superior Court by giving a bond for $100. If the case is not so removed it is tried in the municipal court, and the only appeal is on questions of law. Criminal cases are subject to an appeal to the Superior Court, both on facts and law.

Outside of this Municipal Court of the City of Boston we have seventy-two isolated district, police and municipal courts throughout the State. These include the eight courts in the outlying districts of Suffolk County, the business of which is almost entirely confined in practice to the criminal side, although they have civil jurisdiction. The courts outside of Boston deal with the smaller business, both civil and criminal. An appeal lies to the Superior Court on the whole case regardless of the question of a jury claim. Almost all of these courts have one justice and two special justices.

We have a few trial justices with criminal jurisdiction over the lesser offences.

Hereafter in this report we speak of the district, municipal and police courts as district courts.

There is an Industrial Accident Board, composed partly of lawyers and partly of laymen, dealing with the claims of employees under the Workmen's Compensation Act, subject to appeals to the Superior Court and thence on questions of law to the Supreme Judicial Court. This Board is not a court, but is an administrative commission to make investigations to find facts and to make awards. It has no power to enforce its awards, and when enforcement is needed a report is made to the Superior Court.

Some cases are referred to masters and auditors by the courts other than the district courts by separate appointment of each case to hear the evidence and report their findings to the court.

We have a limited number of official masters in chancery, whose present functions are practically limited to those of bail commissioners and the approval of sureties and similar activities.

There is an association of justices of the district courts, which has been in existence for some years, with a view to bringing about greater uniformity of practice, and to develop interest and discussion among the judges of those courts. An occasional appropriation is made by the Legislature to meet some of the expenses of this association.

The judges of probate have regular conferences for the discussion of practice.

A Board of Bar Examiners of five men is appointed by the Supreme Judicial Court to examine and recommend candidates for admission to the bar. This Board was created by a statute.

3. The Present Appropriations for the Expense of the Administration of Justice.

The following items from the general appropriation acts and the resolves granting county taxes for 1920 will give an idea of the present annual cost to the public of the various branches of the administration of justice. The State appropriations appear in chapters 225 and 629 of the Acts of 1920. The county appropriations appear in chapters 57 to 68, Resolves of 1920.

Summary of State Appropriations.

[The detailed estimates will be found in the acts referred to.]

Supreme Judicial Court,	$140,060 00	
Superior Court,	289,150 00	
Probate courts,	259,338 00	
District attorneys,	95,900 00	
Land Court,	68,500 00	
Commission on Probation,	14,450 00	
Board of Bar Examiners,	7,460 00	
Commission on Uniformity of State Laws,	600 00	
Attorney-General's Department,	90,500 00	
Department of Industrial Accidents,	172,626 00	
Department of Correction,	1,404,390 00	
Department of Public Welfare,	645,082 50	
		$3,188,156 50

SUMMARY OF COUNTY APPROPRIATIONS.

[The detailed estimates will be found in the resolves referred to.]

Barnstable,	$26,200 00	
Berkshire,	92,500 00	
Bristol,	245,000 00	
Dukes County,	4,000 00	
Essex,	229,600 00	
Franklin,	45,800 00	
Hampden,	208,800 00	
Hampshire,	54,700 00	
Middlesex,	534,500 00	
Norfolk,	159,000 00	
Plymouth,	131,856 00	
Worcester,	302,500 00	
		$2,034,456 00
Nantucket County (see Treasurer's report for 1919),		3,775 58
Suffolk County (see Boston City Auditor's Monthly Exhibit for October 1, Document No. 94, 1920, pp. 20–30).		
Suffolk County Court House: — Custodian,	$119,820 54	
Suffolk County Court House: — County buildings,	50,786 00	
Jail,	136,925 26	
Supreme Judicial Court,	49,696 06	
Superior Court: — Civil session, general expenses,	421,759 51	
Superior Court: — Civil session, clerk's office,	113,132 00	
Superior Court: — Criminal session,	284,800 43	
Probate court,	50,006 33	
Municipal court: — City of Boston,	285,208 37	
Municipal court: — Charlestown District,	25,185 35	
Municipal court: — East Boston District,	20,934 20	
Municipal court: — South Boston District,	19,769 43	
Municipal court: — Dorchester District,	17,520 57	

Suffolk County — *concluded.*			
Municipal court: —			
Roxbury District,		$42,735 27	
Municipal court: —			
West Roxbury District,		15,969 03	
Municipal court: —			
Brighton District,		9,587 05	
Boston Juvenile Court,		22,324 62	
Police court, Chelsea,		18,378 00	
Land Court,		4,060 00	
Medical Examiners: —			
Service,		35,632 07	
Sheriff,		3,000 00	
Penal Institutions Department: —			
House of Correction,	$204,196 08		
Office expenses,	19,212 15		
		223,408 23	
			$1,970,437 82
Total,			$7,196,825 90

The foregoing items, except those of Suffolk County, do not include repairs, furnishings, fuel, light, supplies, care and other items of maintenance of court houses, jails, etc. There are doubtless some other items of expense incidental to the administration of justice which are not covered by the specific items listed above. But the foregoing figures are sufficient to give an approximate idea of the cost of administering justice which is paid for by the public annually in taxes. That amount on the above figures is about $7,200,000, and it is a safe guess that if repairs, maintenance, etc., were added in all the counties it would be nearer $8,000,000. With the present high cost of everything the cost is likely to be more rather than less in future. The amount is reduced to some extent by the receipts from entry fees and other payments made by litigants. The receipts are and must be, of course, a comparatively small contribution to the expense, and our concern is rather with questions of organization and procedure which result in this expense, and of the relative value of the service and results gained by the community in return.

In addition to the foregoing expense through the public treasury the cost to those who enter the courts voluntarily or

involuntarily, in the form of sheriffs' fees and expenses, lawyers' fees, witness fees and all the incidental expense of trials, etc., must not be overlooked. There is no available method of figuring these costs, but doubtless they amount to a very much larger figure than the total expense paid through the public treasuries.

4. The Results.

We have no centralized body of information as to the work done by the different courts. From time to time some information has been collected and tabulated by special commissions, such as the Commission on the Causes of Delay in the Administration of Justice, in 1909, and the Commission on the Courts of Suffolk County, in 1911, and the report of the Municipal Court of the City of Boston to the city council in 1916. There are also some statistical tables as to different portions of the work of the courts and of those connected with them in the annual reports of the Secretary of the Commonwealth, Bureau of Prisons and Industrial Accident Board.

(*a*) *The Supreme Judicial Court.*

An account of the work of the Supreme Judicial Court and its arrangements by statutory requirement and by judicial regulation appears in an article by Hon. William C. Loring written after his retirement from the bench and published in "Massachusetts Law Quarterly" for February, 1920. The work may be briefly summarized as follows: —

A majority of the court constitutes a quorum for the performance of the appellate work of the full bench which is the bulk of its work. The court ordinarily sits, for the hearing of oral argument on appeal, with five judges. The two judges who are not sitting with the full court are occupied either in the preparation of opinions or the hearing of cases in equity or prerogative writs, for which there is a continual session in the county of Suffolk throughout the year, and certain times are specified in the statutes for other parts of the State. In addition to such duties the court as a whole is called upon from time to time by State officials or by the Legislature or one of

its branches for advisory opinions under the constitutional provision to that effect. These opinions often involve difficult questions of constitutional law, and, while they are ordinarily delivered without argument of counsel, and do not have the full force as judicial precedents of decisions in litigated cases, they require such care in their preparation as is naturally to be assumed when the advice of the justices of the Supreme Judicial Court is requested by the branches of another co-ordinate department of the government.

The number of cases argued or submitted on briefs to the full bench has varied during the past twenty years from 354 to 477, the yearly average number of cases during the first five years since 1899–1900 being 377; for the next five, 436; for the next three, 388; for the next five, 457; and for the two years of the war, 380. The court disposed of its entire docket every year (with only two exceptions) during that period. Judge Loring suggests that on the return of peace the court ought to be in a position to dispose of a docket of from 470 to 490 cases a year, and, to make sure of doing that, it ought to get more cases in September and October rather than in the four weeks sitting in Boston in March, if the prompt decision of cases on appeal is to be continued without sacrificing the standard of the work. An examination of Judge Loring's brief description of the way in which the working time of the court is occupied shows that the justices have about all they can do under the present arrangements and with their present inadequate assistance.

We suggest elsewhere in this report methods by which we believe the court can be placed in a position not only to maintain the standard of the past, but to render even greater service to the people of the Commonwealth in meeting the ever-growing problems of the administration of justice.

(*b*) *The Superior Court.*

This court of twenty-eight judges is the great trial court of the Commonwealth. The tabulated returns of the civil business in this court, which appear in the report of the Secretary of the Commonwealth for the year ending Nov. 30, 1919, are as follows: —

Returns relative to the Trial of Cases in the Superior Court for the Year ending June 30, 1919.

[Chapter 321, Acts of 1905.]

COUNTIES.	Number of Jury Cases.	Number of Jury-waived Cases.	Number of Equity Suits pending at Beginning of Year.	Number of Each of Said Three Classes of Cases entered during the Year.			Number of Cases of each Class actually tried during the Year.			Number of Cases of each Class disposed of during the Year by Agreement of the Parties or by Order of the Court.			Number of Cases of each Class remaining untried at the End of the Year.			Number of Cases wherein the Verdict of the Jury has been set aside by the Court on the Ground that it was excessive.	Number of Days during which the Court has sat for the Hearing of Each of said Three Classes of Cases.		
				First Class.	Second Class.	Third Class.	First Class.	Second Class.	Third Class.	First Class.	Second Class.	Third Class.	First Class.	Second Class.	Third Class.		First Class.	Second Class.	Third Class.
Barnstable,	44	25	17	38	32	7	8	3	–	20	15	2	62	39	20	–	–	–	–
Berkshire,	174	132	110	104	63	5	20	10	–	104	55	49	154	130	66	–	21	10	–
Bristol,	872	292	188	388	161	69	60	32	18	401	151	18	859	302	239	–	89	13	4
Dukes County,	11	7	7	7	9	5	2	–	3	5	9	3	10	8	4	–	5	5	5
Essex,	1,863	442	570	854	225	136	167	27	21	775	312	371	1,942	355	335	–	304	37	21
Franklin,	179	89	130	94	45	17	18	11	3	128	38	5	145	88	140	–	30	3	2[1]
Hampden,	1,510	569	606	660	282	105	54	14	3	506	229	37	1,586	616	666	–	180	29	20
Hampshire,	122	56	60	61	41	9	27	4	3	54	32	5	99	71	50	–	33	3	2
Middlesex,	3,343	1,026	1,113	1,349	442	163	303	52	15	1,607	494	93	3,128	890	1,183	–	314	33	6
Nantucket,	5	8	5	5	5	4	4	6	4	–	8	4	2	3	1	–	2	2	2
Norfolk,	718	223	192	357	117	38	85	12	7	267	108	18	780[2]	220	205	–	119	18[3]	–
Plymouth,	348	364	170	149	273	27	65	110	15	152	125	4	280	375	178	–	93	21	4
Suffolk,	12,231	2,531	7,051	5,345	1,341	971	1,302	178	221[4,5]	4,300	774	510	13,276	3,098	7,512	3	1,239	89	148
Worcester,	1,288	393	344	706	263	88	148	49	54	606	193	43	1,240	414	335	1	159	35	17
Totals,	22,708	6,157	10,563	9,817	3,299	1,644	2,263	508	367	8,925	2,543	1,162	23,563	6,609	10,934	4	2,588	275	229

[1] Number of hours.
[2] Including 57 tried but pending for judgment.
[3] Second and third classes, including divorce.
[4] Not including 4 law cases and 5 divorce cases tried in equity merit session.
[5] One hundred and eighty-five being Suffolk County cases.

This table gives some impression of the condition of civil business in that court, but it should be borne in mind that most of the cases entered are never tried.

Aside from the cases in which no trial is expected or wanted, or which are disposed of after negotiation between counsel, the actual trial work of a court is inevitably congested to a varying extent in different parts of the State, and in different branches of the work under the present system. A certain amount of such congestion probably is inevitable under any system. As pointed out by the commission of 1909, the term "delay" in these matters is a relative term, and the opportunities for improvement in administrative arrangements and methods are opportunities of degree because the causes of litigation are largely beyond the control of the courts.

Other suggestions in regard to the working of this court are discussed elsewhere in this report.

(c) *The Land Court.*

This court of two judges, owing to its freedom in the arrangement of its time, sittings and other details of its work, is accomplishing a large amount of work, considering the number of persons employed. The peculiar character and conditions of the Land Court have made this possible. The work of the court and of its assistants seems to furnish a striking instance of constructive administration since the court was created, in 1898.

We have had no complaints in regard to the working of the court, and few suggestions in regard to it.

(d) *The Probate Courts.*

These are county courts composed of a single judge in the smaller counties, with a special justice or two for occasional service and two judges in the larger counties, such as Suffolk, Middlesex and Worcester, with the power to call in judges from other counties to sit when necessary. The use of outside judges in this way is largely confined to the counties of Suffolk and Middlesex, where the heaviest business is done. A considerable part of the work of the probate courts is uncontested, as is the

case also in the Land Court, but there is also a considerable amount of contested business, which is likely to increase in the future. Practically all the property in the Commonwealth passes through the administration of the probate courts every thirty years or so in one way or another.

The main problems in connection with these courts have to do with conflicts of jurisdiction with other courts and the resulting complications. These are discussed elsewhere.

(*e*) *The District Courts.*

These courts deal with a greater volume of cases than any other courts in the Commonwealth, although the amounts involved and the seriousness of the offences on the criminal side are less than in the Superior Court.

The word "inferior," often used as to these courts, is a purely technical term when properly used, but is apt to have an unfortunate significance in the minds of many people. The courts are not "inferior" in importance in any sense whatever. They are in many ways the most important courts in the Commonwealth because of the fact that they represent the administration of justice in Massachusetts to the minds of more people than any other courts.

The Municipal Court of the City of Boston, because of its position as the central court in the largest city in the State, which handles much of the civil business of Suffolk County in addition to a large amount of criminal business, forms a class by itself, and has been so dealt with by the Legislature. There are normally about 15,000 civil entries and 60,000 criminal entries in this court annually. The administrative experiments, which have been tried in this court with the authority of the Legislature, particularly under the act of 1912, have brought it into a position as a modern court with reasonable equipment and opportunities for service, so that it is capable of still further development in its usefulness whenever the Legislature considers it advisable to take the necessary steps.

In this connection the fact may be mentioned that an abbreviated record system was worked out some years ago in this court, "which the Chicago Municipal Court adopted bodily,

and which they have since advertised as saving to the taxpayers of that city over $200,000 a year."

The Boston Juvenile Court, created in 1906, is a separate court with jurisdiction in juvenile cases in the central district of Boston. It has done pioneer work, which has been very valuable. It has, of course, excited some criticism, as all work in the difficult field of dealing with juvenile offenders is bound to do; but the court has justified its creation, and the main problems in the future have to do with its further development and its relations with other courts.

The other courts of Suffolk County, of which there are eight, deal almost entirely with criminal business, including juvenile and non-support cases, as most of the civil cases are brought in the central court as the most convenient place for the parties and the lawyers concerned. This criminal business varies greatly in amount. The amount of business varies not only with the population, but also from special causes, such as the difference in the amount of automobile traffic, which gives rise to more prosecutions for violation of traffic and other laws in some districts than in others.

The question has been raised at intervals during the past forty years as to whether the public interest would not be more efficiently and economically served by a consolidation of these outlying courts with the central court into one municipal system. This subject is more fully discussed later.

The sixty-four district courts in other parts of the State outside of Suffolk County deal largely with criminal business, but they also have varying amounts of civil business. The amount and character of the business naturally vary in accordance with the differing conditions in the country districts and the larger cities of the State, the character of the population, industrial activities in the neighborhoods, etc.

There has been much discussion from time to time in regard to the whole system of district courts as isolated institutions, and the waste of judicial power and other possibilities of service involved in the present distribution and working machinery in these courts and their relation to other courts. These matters are also more fully treated later.

(*f*) *The Industrial Accident Board.*

As the Industrial Accident Board is not a court but an administrative commission dealing entirely with cases under the Workmen's Compensation Act, we have not included it in our inquiries.

5. Discussion of a Proposal to unify Courts.

A suggestion has been presented to the Commission with much force that a plan of unifying the courts along lines suggested by the report of the English Judicature Commission of 1869 should be recommended. One suggestion is that the Superior Court should be abolished and the Supreme Judicial Court enlarged to twenty or more judges, who should do all the work now divided between the Supreme Judicial Court and the Superior Court; that there should be an appellate division of from three to five judges to be assigned by the chief justice for appellate work, and the other judges assigned to work in the equity, common-law or criminal courts; and that the court should be given general powers to arrange the times and places of its sittings, and given the power and responsibility for the administration of justice without detailed legislative restrictions.

Such a plan has much to recommend it, not only in the logic of effective methods for the conduct of modern business of importance, but in the successful experience of the English courts which, as stated in 1903 by the New York Commission on the Law's Delays, "were formerly the most dilatory in the world," and "have become" since 1875 "the most expeditious" as a result of greater unity, more centralized responsibility, greater simplicity in procedure, with the power of development in the court itself with the critical assistance of the bar.

If the problem before the Commission were one of preparing for a new community the best system of courts and of procedure which could be devised for "a busy people who cannot afford to waste time and money," the theory of a "unified" or "single" court, with different branches or divisions for all the various judicial duties required in the State, and an administrative head with adequate power and a sufficiently elastic system to enable him to dispose of all the judicial power in

accordance with the requirements of the business to be done in the various parts of the State, would have much to recommend it. Even as it is, with the problem presented of recommending improvements in the system of one of the oldest American Commonwealths, the ideal of greater unity and of greater flexibility and elasticity in the administrative features, as well as of greater responsibility, must be borne in mind as one to be approached as far as practicable.

On the other hand, we are dealing with a system for the administration of justice in an old Commonwealth where, whatever may have been the defects of the system, the personal character and ability of most of the individuals who have held judicial office have, on the whole, made the system work, as modified from time to time during a period of one hundred and forty years, in such a way as not only to retain the respect of the community, but to give the State a distinguished position in the minds of all thorough students of civil government.

It must be remembered that in the development of a judicial system sudden changes of a very radical character suggested by logical theories of efficiency are not easily effected, and that, even if adopted, there might follow in practice unexpected and undesirable results from the disturbance of local conditions, traditions and prejudices effected by changes, the reasons for which would not be generally understood or agreed upon by the bar or by the public.

This danger of producing new and undesirable conditions by attempting to transplant suddenly in an old community an entirely new judicial structure, however logical and efficient it might be, is, in the minds of the Commission, a controlling objection to plans involving the abolition of the whole system of courts with their reconstruction on other lines. It could not be done without the support of a large body of the bar, and we do not find any general opinion in its favor.

The central idea underlying the leading discussions of administration in this country in recent years is to work out plans adapted to the different States of dividing the work to be done and placing the responsibility for doing it as promptly and finally as possible, in accordance with the requirements suggested by the nature of the work.

The Commission believes that there are various ways in which the substantial part of the existing judicial structure can be gradually adjusted without very radical changes to the growing demands of the work required of it.

With the increasing number of problems to be dealt with, the economy in the sense of expense which is possible to-day is, of course, relative. The total expense of the judicial system is apt to increase naturally and unavoidably as the community grows, and the main inquiry in this respect must be as to the best arrangement by which the State and public can get the maximum service and results from the inevitable expense.

A possible arrangement for the judicial system would be to consolidate all the present judicial functions into two courts. The first of these would be similar in its character to the present district and probate courts. Its jurisdiction would be co-extensive with some division of the Commonwealth, with court houses and clerks' offices in some of the cities and towns where the present district courts are held. There could be a sufficient number of judges to devote all their time to the work of the court, different judges being assigned, or perhaps appointed, for different divisions of the work. The clerks of court might be granted somewhat greater powers than they now have, and be enabled to transact the ordinary routine business of the court, while the judges heard the contested cases and matters of more than routine importance. The decisions on facts would be final, but there would be an appellate division whence matters might if necessary be brought to an ultimate court of appeal. This first court would be close to the individual citizen from the time of his birth until his death, and would administer his estate after his death. It would have jurisdiction at law over all civil matters which did not require a jury, and over all of the lesser crimes, and over ordinary probate, divorce and domestic relations, and a limited jurisdiction in equity.

The other court would be a combination of the present Supreme Judicial Court, the Superior Court and the Land Court, and would hear jury cases. It would be the great trial court, with jurisdiction in more important equity matters and over all prerogative writs and rights in land.

It would have an appellate division similar to the present full

bench of the Supreme Judicial Court to hear the final appeals on questions of law, and judges would be assigned to different portions of the work, including this appeal work, or, if our suggestion to preserve the Supreme Judicial Court should be followed, might, perhaps, be specially appointed for appellate work. The two courts would be further unified by a judicial council similar to the council we have suggested later in our report.

We are not prepared to recommend this simplified organization at the present time. In the first place, we are by no means sure that, if it were adopted, it would work out in actual practice as well as it might appear on theoretical consideration. In the next place, we are inclined to think that the community is not at present ready for it.

We are, however, prepared to recommend that it be given very careful study and consideration, bearing in mind that all fundamental improvement is better attained by a gradual process rather than by a sudden change.

6. The Need of Closer Relations of the Courts.

While we do not recommend abolishing all the courts below the Supreme Judicial Court, and enlarging that court along the lines already suggested and discussed, we do believe that the present artificial separation should be much modified.

Accordingly, we recommend provisions for the extension of the concurrent jurisdiction of the Superior Court, and enabling judges of one court to sit in another court when occasion demands, as judges of the probate courts or of the district courts may now sit, and by which cases may be transferred from one court to another when justice so requires.

We submit in Appendix A drafts of legislation to carry out this plan of bringing the courts into closer relations in various ways.

7. The Need of a Judicial Council.

The courts of Massachusetts have developed hitherto as separate organizations having very little relation to each other. There has never been any central body of a permanent character for the accumulation of information and the consideration

and discussion of questions of organization, practice and procedure bearing on the subject of judicial administration.

We are not unmindful that from time to time commissions or special committees have been appointed to consider the judicial system or parts of it. The reports of these commissions and committees are valuable, but unfortunately copies of the most of them are very scarce. Many of the recommendations thus made have been adopted by the Legislature. From time to time, also, committees of judges have revised the rules of various courts. The judges of probate courts have for some time held regular meetings for the exchange of ideas and the development of greater uniformity in practice. Some years ago an association of justices of the district courts was formed for similar purposes, and it has from time to time published valuable reports in regard to various matters, and useful legislation has resulted.

The bar associations and committees of such associations have also made studies and recommendations to the bar, the courts and Legislature, and some of these recommendations have been adopted.

The legislative committees on the judiciary and on legal affairs are in constant session every year hearing petitions for legislation of every variety relative to the courts, submitted mainly by individuals. Some of these suggestions have been carefully prepared and thought out, while many of them have not. These committees render good service to the Commonwealth in dealing with such proposals. Both of these committees, however, are overburdened with the many petitions for legislation presented to them every year, in addition to the work of the individual members in other connections.

It is not a good business arrangement for the Commonwealth to leave the study of the judicial system and the formulation of suggestions for its development almost entirely to the casual interest and initiative of individuals. The interest of the people, for whose benefit the courts exist, calls for some central clearing house of information and ideas which will focus attention upon the existing system and encourage suggestions for its improvement.

There is at present no body charged with the duty of collecting the facts regarding the work and expense of the various courts whereby a judgment may be formed as to the relation between cost and results. It is true that certain statistics are reported by clerks of courts to the Secretary of the Commonwealth, and these are printed each year in the Secretary's report. Other statistical information appears in the report of the Bureau of Prisons, in the reports of the Probation Commission, and an occasional report from a special temporary commission like those of the Commission on Causes of Delay in the Administration of Justice, in 1909, the Commission on the Suffolk County Courts of 1911, and the report of the Municipal Court of the City of Boston of 1916. As pointed out by the commission of 1909 the figures obtained at that time were "in many instances made up by different systems of classification in vogue in the different counties and courts," and much of the time of that commission was consumed in the collection and correction of such material, so that the time at their disposal was much shorter than they wished (see report, pages 5, 6).

Some central official body is needed for the continuous study of questions relating to the courts. Such a body, the Commission believes, should consist partly of judges and partly of members of the bar, with the chief justice of the Supreme Judicial Court as the head of the judicial system of the State, or some other member of that court, delegated by him, as its presiding officer. The members of this body should serve without compensation, but they should be provided with the necessary clerical assistance and an efficient executive secretary, at an adequate salary, to collect information and prepare the material for their consideration.

It has been suggested that such a council should be given rule-making powers, but, in the opinion of the Commission, this is not necessary. The functions of the body should be those of a permanent judicature commission, with authority to investigate and with the duty of submitting an annual report to the Governor in regard to the work done in the courts of the Commonwealth, and making such suggestions as they deem advisable. The contents of such reports may then be used as a basis of study and recommendation by any one interested, and

the Legislature, the bar, the courts themselves and the people will be better informed than they ever have been before in regard to the operation of this branch of the government. It should be provided, also, that clerks of the various courts should make such periodical reports in regard to the business done as the council may require, so that a centralized system of statistics may be developed.

It does not seem advisable that this body should be too formal in its character or in its deliberations. The main point is that there shall be an officially recognized body of judges and members of the bar who are expected to meet for the mutual exchange of views and the discussion of practical questions, to whom suggestions may be made, and who will report annually. The Commission believes that such discussions would gradually result in many valuable improvements in the courts of the Commonwealth and the methods of administration and practice.

For these reasons the Commission recommends legislation to provide for a judicial council, and submits a draft of such legislation; and we believe that this recommendation of such a council, with such functions as are outlined above, will appeal to the business sense of the community.

8. Discussion of the Rule-making Power.

Suggestions have been made to the Commission that the entire regulation of practice and procedure and of the times and places of the sittings of the courts should be turned over to the courts themselves by statutes similar to the English statutes of 1875, or to the New Jersey statute of 1912, the effect of which is explained below. Another suggestion was that the extended rule-making power should be placed in the hands of a judicial council. This latter suggestion has already been considered.

Arguments in Favor of granting Full Rule-making Power centralized in the Supreme Judicial Court.

As to the proposal for centralizing the entire rule-making power for all the courts in the hands of the Supreme Judicial Court, including the power to modify the regulations in existing

statutes, the argument in support of these proposals is in substance as follows: —

Massachusetts is a common-law State, and, as some one has said, the strength of the common law lies in its development by the courts with the assistance of a keenly critical bar and an enlightened public opinion. It is a striking fact that, as a result of a discussion of these subjects throughout the country, there is now a strong movement to secure the passage by Congress of a bill (Senate, No. 1214): "To authorize the Supreme Court of the United States to prescribe forms and rules, and generally to regulate pleading, procedure and practice on the common-law side of the Federal courts."

The New Jersey Legislature, in 1912, turned over to the courts the control of their own methods of doing business by a simple practice act with certain rules attached to it, and then provided that "the Supreme Court shall prescribe rules for that court and for the Circuit Courts and Courts of Common Pleas to give effect to the provisions of this act and to otherwise simplify judicial procedure. Such rules shall supersede (so far as they conflict with) the statutory and common-law regulations heretofore existing."

This practice act has been in successful operation in New Jersey ever since 1912, and it has been recently printed in the "Journal of the American Judicature Society" for October, 1920, as a suggestion for other States.

In England, since the Judicature Acts of 1875, practically unlimited rule-making power has been placed in the hands of a rule-making body consisting of judges and some representatives of the bar presided over by the Lord Chancellor, who is the head of the English judicial system. This body and an account of its work is described in Rosenbaum's "Rule-Making Power in the English Supreme Court," of which chapter 3 is reprinted for convenient reference in the "Massachusetts Law Quarterly" for May, 1920. This rule committee acts both as a judicial council and as a rule-making body.

The English Parliament retains its power of control over rules of court, but that power has seldom, if ever, been exercised. A rule of court is framed by the rule committee, composed of judges and representatives of the bar. It is published and ex-

plained and discussed in the professional journals, and after it is adopted it can be repealed or modified in the light of experience without waiting for a legislative session, or for several legislative sessions, to consider the matter.

Discussion of the Argument.

There is much to be said in favor of such a plan based upon the idea that, since the courts are regarded as responsible for the administration of justice, they should be given full rule-making power and control over the times and places of sittings in order to meet that responsibility.

We believe it to be a sound proposition that, so far as practicable, the power and responsibility for rules of procedure and practice should be given to the courts themselves, so that they may apply the lessons of experience and try reasonable experiments without the necessity of legislative action. This arrangement in England has proved successful and satisfactory to the bar and the community, and it may have been necessary there by reason of the extent and variety of the affairs, both local and imperial, with which the English Parliament is obliged to concern itself.

The same reason applies to the relations of Congress to the Federal courts. With the increasing number of legislative problems for the consideration of State Legislatures, a similar reason might apply to the relations between State Legislatures and the administration of justice in the States.

We are convinced, however, that we are more fortunate than the people of many of the other States in the judgment shown by Massachusetts legislators in regard to problems relating to the courts, not only in what they have done, but in what they have not done. We wish this to be clearly understood in connection with any comments or suggestions made in this report. It is because we believe this that we recommend the creation of a judicial council as an advisory body to collect information and formulate suggestions as a means of better co-operation between the Legislature and the courts.

We have had a Massachusetts Practice Act ever since the legislation in the early 50's based on the report of the commission of 1851, which consisted of Benjamin R. Curtis, later

associate justice of the United States Supreme Court; Reuben A. Chapman, later chief justice of the Supreme Judicial Court of Massachusetts; and Nathaniel J. Lord, then a leader of the Essex County bar. After the act of 1877, granting full equity jurisdiction to the Supreme Judicial Court, an act was passed in 1883, chapter 223, the substance of which now appears in chapter 214 of the General Laws, which not only gave the Superior Court concurrent jurisdiction in equity, but which also simplified equity practice and pleading very materially. Because of these acts, which have worked well in practice and are understood by the bar, there is no occasion for a wholesale recasting of State practice. There is no substantial ground, in our opinion, for general attacks on the Massachusetts system of procedure.

We believe that what is needed is occasional improvement in detail made by carefully worded statutes or rules of court, based upon the best practice and the best precedents, and drawn in the spirit of perfecting and protecting a comparatively simple system of procedure adapted to its purpose.

Supplementing our Practice Act, we have a broad rule-making power, which has existed for many years in the Supreme Judicial Court and the Superior Court, and which appears in section 3 of chapter 158 of the Revised Laws, and chapter 213 of the General Laws, which reads as follows: —

Section 3. The courts shall, respectively, make and promulgate uniform codes of rules, consistent with law, for regulating the practice and conducting the business of such courts in cases not expressly provided for by law, for the following purposes:

First, Simplifying and shortening pleadings and procedure.

Second, Prescribing the terms upon which amendments will be allowed or unnecessary counts and statements stricken from the record; discouraging negligence and deceit; preventing delay; securing parties from being misled; placing the party not in fault as nearly as possible in the condition in which he would have been if no mistake had been made; distinguishing between form and substance; and substituting fixed and certain requirements for the discretion of the court.

Third, Conducting trials.

Fourth, Presenting distinctly the questions to be tried by the jury.

Fifth, Giving a party such notice of the evidence which is intended to be offered by the adverse party as will prevent surprise and enable him to prepare for trial.

Sixth, Prescribing such forms of verdicts as will place upon record the finding of the jury.

Seventh, The entry of judgment by the clerk under a general order in all cases ripe for judgment.

Eighth, Expediting the decision of causes and securing the speedy trial thereof.

Ninth, Remedying abuses and imperfections in practice and diminishing costs.

Tenth, Filing and hearing motions to set aside verdicts and notifying adverse parties thereof.

Eleventh, The superior court may also make and promulgate such rules for the regulation of the printing, publication and distribution of trial lists and for notifying attorneys of trials in civil causes as the public convenience in the several counties requires.

The rules of the superior court shall not conflict with those of the supreme judicial court.

While there are certain provisions in our statutes relating to practice which restrict the action of our courts, and in our opinion should be repealed or altered as suggested elsewhere, yet we think it wiser that such changes should be made by the Legislature after public discussion based upon the suggestions made in this report, or future studies by a judicial council, rather than that the entire responsibility should be thrown upon the courts in addition to their other burdens under the existing organization and arrangement for the division of work.

The existing rule-making power, which has stood substantially in its present form for so many years, should be maintained and should be exercised by the courts, and regulation by rules of court should be encouraged by the Legislature. We believe that the work of the judicial council suggested will be of great assistance to the courts in this connection. We do not doubt that where investigation shows that an extension of the rule-making power in regard to some particular matter is a better method of providing for improvements in administration than the slower process of legislative regulation, the Legislature will grant such extension.

II. THE DISTRICT COURTS.

1. The Need of an Administrative Committee.

There is a constantly growing emphasis on the importance of developing and improving the standing, the powers and the procedure in the district courts, and the recognition of their importance by the bar, by the public and by the appointing power. The reason for this increasing emphasis is the fact that these courts deal directly with more people in the community than any other courts, and, consequently, the ideas in regard to the system of administering justice in the minds of very many of our citizens and of the immigrant population in the community depend on the picture presented to them of the administration of justice through their practical experience and observation in the only courts within their knowledge.

Much criticism has been directed at these courts, or, in some of them, at the judges themselves. There is nothing new about this. Such criticism was reflected in the report of the joint legislative committee on judicial system in 1886 (Senate Document No. 10 of 1887), and since that time. It is not surprising that such criticism should be made as to the operation of a system composed of seventy-three separate courts scattered about the State in cities and towns of varying population in which the amount of business to be done by the court differs greatly in amount and in character, and when the salaries for the work naturally vary.

In spite of the criticism of some of these courts or of the judges, or the special justices, in others, we believe that the community has received much better service from them than might have been expected from the inherent limitations in the existing system. Their development throughout the State has not been in accordance with any uniform plan. As stated in the report of the committee in 1886 above referred to, the courts then existing were "an outgrowth and modification of the old justice of the peace system," and, further, "The frequent establishment in later years of these courts has tended to detract somewhat from the dignity and meaning of the judicial title."

But in spite of all the criticism, merited or unmerited, the establishment of these local courts, as occasion seemed to arise in the judgment of the Legislature, has continued without any system by which the administration of justice through these courts might be made more uniform and gradually improved.

To counteract the results of the isolation of each court, the Association of Justices came into existence some years ago as a voluntary organization of judges to discuss questions of practice and procedure. The results of the work of this association have been valuable, and recommendations which have originated in this body have been enacted into law.

Suggestions have been made that the district courts of the State outside of the county of Suffolk should be reorganized as a circuit system with a chief justice, and that the judges should travel about the State much as the Superior Court does, or that various districts should be established and assignments of judges made to particular districts with regular circuits, or that such districts should be established in the different counties. It is suggested that such a reorganization would result in greater economy for the State as far as expense is concerned, and in greater economy and increased efficiency in the system of district courts as a whole, as compared with the results of the present system of sixty-four isolated courts.

These are not new suggestions. Something similar was briefly mentioned in the report of the commission of 1876 (Public Document No. 32, 1877, pages 7, 8), and again by the joint committee of 1886 (see report, Senate, No. 10, 1887, page 6).

In view of the varying size, position, amount and character of business in the different counties of the State which are divided by historical or geographical lines, having no relation whatever to any centralized system of judicial administration, we do not recommend at present county circuit courts.

As far as a centralized system operating by various district circuits, without regard to county lines, is concerned, the argument based on economy of money and judicial power and the possibilities of increased efficiency in many ways is strong, and, if the problem were one of devising a system for a new State, some such plan might be the most promising. But that is not the problem. As stated in various places in this report, the

establishment of local courts, as well as the sittings of other courts, has been the result of a policy of meeting what the Legislature considered local needs by an isolated local court, rather than a policy based on any concerted plan for the development of a judicial system offering better opportunities for natural and continuous growth in accordance with the changing conditions in different parts of the Commonwealth. These courts having been established, many of them for a long period of years in response to local demand, strong local feelings and traditions as to the importance of a particular court in a particular place have grown up. This is probably so strong in regard to most of these courts that an attempt at a radical reorganization would be futile.

Facing the problem as it is, therefore, we think that as a practical matter more can be gained for the community through the development of most of the existing courts into more responsible and effective tribunals of a less isolated character than by attempting a radical reorganization.

Resolves of 1920, chapters 57–68, show the appropriations for salaries and expenses of district courts, other than those in Suffolk County and Nantucket, to be as follows: Barnstable, $11,000; Berkshire, $33,000; Bristol, $76,000; Dukes, $1,600; Essex, $125,000; Franklin, $12,000; Hampden, $55,000; Hampshire, $19,000; Middlesex, $158,000; Norfolk, $55,000; Plymouth, $33,000; Worcester, $110,000; total, $688,600.

It is probable that a detailed examination of the practical operation of each of the district courts in the State, and of the time required by the judges in the administration of its business, would show that some of these courts might well be abolished and consolidated with some other districts because of the lack of a sufficient amount of business. The joint committee of 1892 considered this subject and recommended the abolition of several of these courts, outside of Boston, and their consolidation with others (see report, Senate, No. 31, 1893, pages 11, 12). Whether a similar recommendation should, or should not, be made again at this time, the Commission is not in a position to say, owing to the fact, explained elsewhere, that the wide scope of the inquiry which the Commission was asked to make has made it impossible to examine in detail the

operations of all the district courts in the State, as it would have left no time to consider any other questions. We believe that the whole question in regard to reorganization of these courts, or some of them, can be better understood after a system of statistics is established under the supervision of the judicial council, as already suggested. The extent to which the different lower courts may be resorted to by people in different localities under the recent act establishing a new procedure for the collection of small claims is uncertain, and can be ascertained only after the act has been in practical operation for a sufficient length of time, so that the people in the various communities appreciate its possibilities. It is possible, also, that, if other recommendations of this Commission in regard to the jurisdiction of the district courts are favorably considered, the bar may make more use of some of the courts which now have very little business, and thus may provide some additional justification for their existence other than local sentiment. In the course of a few years a system of statistics would bring out facts which would place all courts in better perspective. But if all these courts are to continue to exist, that is no reason why each one should constitute a separate little system by itself. Such isolation is not adapted to the gradual improvement which results from the closer contact of the various parts of such a system.

Another suggestion has been that the State should be divided into three districts, leaving the existing courts as they are, but providing a chief justice for each district with the power of assignment, etc., and creating a judicial committee of the district courts, which should consist of the chief justices of the three districts and the chief justice of the Municipal Court of the City of Boston, for the purpose of consulting from time to time and investigating the working of the courts in the various districts and making recommendations in regard to them.

A third suggestion is that, instead of having a division into districts with chief justices, a committee of judges of the present courts should be created, the judges serving upon this committee to be selected from time to time by the chief justice of the Supreme Judicial Court; that this committee should have the power and duty of studying the work, the procedure, prac-

tice, methods of keeping records, etc., of the various district courts, and of making suggestions to the judges of such courts, or formulating rules for the consideration of the judges as a whole, with a view to improving, or making more uniform, the practice and methods of administration throughout the Commonwealth.

The Commission believes that there should be some body charged with the duty and given the power to investigate and to make recommendations. Of various suggestions of this kind, explained above, the Commission feels that the plan for a committee of judges, a plan which has the approval of a vote of the Association of Justices of the district courts, is the one most likely to work in practice, and we recommend it and annex hereto a draft for legislation to that end as a section in the act submitted relative to appeals in the district courts.

2. Appeals in Civil Cases.

The Commission is satisfied that the present system of appeals from district courts to the Superior Court, providing as it does for two trials of fact in the smaller civil cases, with the resulting delay to the parties and cost to the Commonwealth, is a great waste of judicial time and power which ought not to continue. Trying small cases twice, maintaining courts for the conduct of ineffective trials, is merely consuming the time and money of parties and witnesses, many of whom can ill afford the loss and the delay involved in two trials.

The commission of 1909, after a careful analysis of the business of the various courts, said (see report, page 21): —

> . . . 2,496 cases, or nearly one-fifth of the total entries, both jury and jury-waived cases, in the Superior Court . . . were appeals from the lower court. The commission feel that the present practice — whereby the losing party in the lower court by merely giving a bond for costs may enter an appeal, the result of which is that the trial in the lower court goes for absolutely nothing — tends to make the trial in the lower court little more than a preliminary skirmish, which simply takes up the time of a tribunal amply qualified to make final determination of the rights of the parties, and results in an expense and delay inconsistent with the economy of a modern judicial system.

That commission then recommended a plan for all the district courts, which was not adopted, but a plan for meeting the situation described by the commission was recommended as an experiment in Suffolk County after further investigation by the commission of 1911 on the Suffolk County courts, and was adopted by the Legislature in 1912. The experiment has been successful, and the fears expressed before its passage have evaporated.

The proposal to extend the substance of the Boston plan to the other district courts of the State has now been discussed before the Legislature and in print for more than ten years.[1]

As the system of double trials on the facts has been gradually abandoned, first in the Supreme Judicial Court, then in the Court of Common Pleas (which preceded the Superior Court), then in the Land Court in 1910, then in the Municipal Court of the City of Boston in 1912, and lastly in the probate courts by chapter 274, General Acts of 1919, the Commission believes that the time has come to take the next step and abandon the system in the district courts generally. In our opinion, the sooner this is done the better.

Two plans for doing this have been brought before the Legislature. Both plans protect the right of jury trial by provision that the plaintiff, if he wishes a jury trial, must bring his suit in the Superior Court, and the defendant, if he wishes a jury trial, may remove his case to the Superior Court.

The difference between the plans has been in regard to the method of reviewing questions of law. One plan provides for an appeal on questions of law only to the Superior Court, and the other plan for an appeal to some form of appellate tribunal of district court judges, with a right of appeal directly to the Supreme Judicial Court in the manner now in force in the Municipal Court of the City of Boston.

We recommend the plan for appellate divisions of district

[1] See Lummus, "The Failure of the Appeal System" (1909), reprinted in part in Reinsch, "Readings on American State Government;" Report of the Commission on the Inferior Courts of the County of Suffolk, House Document No. 1638, 1912; Report of Committee on Legislation of Massachusetts Bar Association for 1914, pp. 27-48, containing a complete discussion, and for 1915, p. 5; Bolster, Address to Massachusetts Bar Association (1915), 1 Massachusetts Law Quarterly, 64; Reports Nos. 4 and 6 of Committee on Law and Procedure of Association of Justices of District, Police and Municipal Courts; Report of the Municipal Court of the City of Boston (1916), pp. 5-8.

court judges to be assigned for such work from time to time in three districts of the State by the chief justice of the Supreme Judicial Court. This plan has received the support of many members of the bar in different parts of the State, and of the Association of Justices of the district courts.

With the pressure of other business in the Superior Court as much work as possible should be finally disposed of in the district courts without taking up the time of the Superior Court judges. Furthermore, the provision for an appeal from a district court judge on a question of law to a Superior Court judge is open to the criticism that such an appeal from one judge to another is a poor system, although even that would be better than the present system of double trials on the facts.

The appellate division plan has worked well in Boston, and we see no reason why it should not work well in other parts of the State, particularly if coupled with our other recommendations. It will raise the standing of the district courts and the character of their work.

We believe that this recommendation also will appeal to the business sense of the community.

If this recommendation is favorably considered, the question arises as to the reasonable conditions under which a defendant who claims a jury may remove the case.

In the act of 1912 relating to the Boston court, and providing for removal before hearing in that court of civil cases in which a jury trial was desired, a removal bond of $100 to cover costs is required. The act also provides that the court shall have power to dispense with this removal bond upon application where justice may require, owing to the inability to give such bond. As a practical matter, however, during the eight years of experience under that act, we understand that applications for relief from the necessity of giving such a removal bond have been almost unknown in that court. We also understand that the number of removals with bond given increases when the result of the removal will carry the case over the summer because of the fact that it cannot reach a hearing in the Superior Court before that time, and the number is less when the case is begun so near the summer vacations that it will go over anyway without a removal to the Superior Court. Such facts

indicate that the power of removal is to some extent resorted to for the purpose of delay and the convenience of counsel, rather than from dissatisfaction with the district court as the place for hearing.

The requirement of a removal bond seems to us a reasonable requirement in order to avoid removals merely for the purpose of delay and of forcing a plaintiff into a more expensive court.

We believe, however, that such a requirement of a bond may excite more opposition in other parts of the State than in Boston, where the bond has not created any very serious burden, as shown by the fact that applications to the court for relief from the bond have been so few. If the Legislature considers it advisable, the requirement of a removal bond can be eliminated from the act relating to the district courts in general submitted herewith.

We do not advise the omission of the requirement of the bond, but we believe the experiment worth trying, even if the bond requirement is omitted, as it can, of course, be inserted later if necessary after the plan has been tried without it.

We submit a draft of legislation on this subject, and have indicated by brackets the words to be omitted if the requirement of a bond is to be omitted. This draft of legislation includes also sections for an administrative committee already recommended.

3. Jurisdictional Limits.

The civil jurisdiction of the district courts is now limited as follows: in the Municipal Court of the City of Boston, to cases "in which the debt or damages or the value of the property alleged to be detained does not exceed two thousand dollars," and in the other district courts to $1,000. These arbitrary limits, while they were reasonable enough as practical experiments in the earlier development of the courts, seem to serve no useful purpose to-day, and cause unnecessary congestion and delay in various ways.

We believe the sounder plan is to allow a plaintiff to bring a suit for whatever amount he chooses in the court before which he is satisfied to have it heard, and to give the defendant an opportunity of removing the case to the Superior Court if it exceeds the present jurisdictional limits of the district courts,

if he is not satisfied that it should be heard in the district court. Under this plan both parties could avail themselves of the courts in which both the cost and the necessary delay in disposing of the case are less. Neither party would be forced into the district court, if he wished to remove his case and comply with reasonable regulations in regard to the matter, and the public would gain whenever the district courts were thus resorted to, as the higher and more expensive courts would be to that extent relieved of an undue accumulation of business.

As pointed out elsewhere, we also believe if the jurisdictional limits of the lower courts were removed, or even if they were materially raised to cases involving $5,000 or more, that there would be more opportunities for the hearing of cases in which no jury was desired, and that this would be taken advantage of in those communities where the bar was satisfied to try their cases before the district courts, rather than to face the delay and expense of trial in the Superior Court or of reference to an auditor.

The present system, which says to litigants who are willing to go into the court which involves the smaller public cost that they shall not go there, but must go into the court which costs the public more, because their claim happens to be $1,001 instead of $1,000, or some other variation of figures having no real relation to the difficulty of dealing with the case, seems a serious and an unnecessary waste both of public money and of judicial power, for which the public pays.

As pointed out by Chief Justice Bolster in an address before the Massachusetts Bar Association in 1915, discussion usually centers about cases which are tried, and we forget the large number of cases that never come to trial, but which are disposed of with greater or less expense, according to the rules provided for such disposal. One of these rules, which seems too expensive for the public, is the arbitrary jurisdictional limit in these civil cases.

In the address above referred to, Chief Justice Bolster said, referring to conditions in 1915 in the Boston court: —

> The municipal court tries only 1 in 8 of its entries, the Superior Court scarcely more than 1 in 6 of its civil law entries. The large bulk of the entries in both courts are cases brought not for the determination of dis-

puted rights, but for the enforcement of known rights. The proper handling of such cases in the courts is just as important to community well-being as the correct trial of causes. When you come to deal with large numbers of these cases, in thousands, putting little tax upon the judicial, but much upon the clerical, force, it seems to me the public has a right to say that those cases shall be handled in a court which can handle them with as little public cost as possible, consistently with the safety of litigants.

Since the plan of 1912 was tried in the Boston court as an experiment by the Legislature, and as that experiment has proved to be a success, we suggest that the experiment of removing or raising the jurisdictional limits in civil cases at law be tried in that court, and we believe that there is equal reason to expect it to succeed.

But we do not limit our recommendation in this respect to the Boston court. While the number of cases which are not tried, as well as the number which are tried, is larger in that central court than in other district courts, we believe that there are special conditions, already referred to, in other parts of the Commonwealth which call for a similar experiment, such as the practical desire expressed for more opportunities for hearings without juries before a judge.

Therefore we submit an act removing the jurisdictional limit in civil cases at law in all the district courts, including the Boston courts, with the power of removal by defendants without bond.

4. The Question of providing Juries in the District Courts.

The plan of providing a jury of six or twelve in the district courts has been suggested. The experiment was tried in some of the lower courts about 1870, and abandoned in a few years. There seems to be no sufficient reason for repeating the experiment to-day.

We do not believe there is enough to be gained by providing juries, even in the district courts of large cities, to warrant the expense and the increase of judges and other officials which would be involved. We have referred elsewhere to the estimate of the annual cost of a continuous jury session of the Superior

Court ten years ago, by the commission of 1909, as $30,000. It must be considerably more to-day. It is better to have one jury court and to rearrange the system, as recommended elsewhere, in order to reduce the accumulation of business in the jury sessions in other ways.

5. Domestic Relations in the District Courts.

Jurisdiction on this subject is in an unsatisfactory condition.

The Superior Court has jurisdiction to grant divorces, and incidental to that procedure to award the custody of children to one parent or the other. The probate courts have jurisdiction of petitions for separate support and custody of children between husband and wife living apart for justifiable cause, including the power to restrain the husband from interference with the wife under such circumstances, and the power to secure to the wife the control of her own property without interference from the husband, and without securing a release of the statutory rights which a husband normally has in his wife's real estate. In such cases the order of the probate court directing the husband to pay a fixed sum of money to his wife is enforced by proceedings for contempt for failure to comply with the order. The district courts throughout the State have jurisdiction, under the Uniform Desertion Act (General Laws, chapter 273, sections 1–10), over criminal proceedings against the husband for nonsupport. In practice, this form of remedy is the most effective proceeding to force the husband to contribute to the support of his family by fixed payment, because the probation officer acts as a collection agent, and under the criminal procedure the husband can be followed into another State and be brought back. Under this statute hundreds of thousands of dollars are collected every year for the support of deserted wives and children, thus relieving the public of a burden which it is the duty of the husband, both to his family and the community, to bear.

Under these statutes certain conflicts of jurisdiction arise in cases in which a wife is living apart from her husband for justifiable cause. In such cases, if the wife not only wishes support, but wishes also an order restraining her husband from

interfering with her, and an order for the custody of the children, she must go to the probate court. As the probate proceedings to force the husband to pay money are not as effective for practical reasons as the proceeding in the criminal courts, she may find that she cannot collect the money because of difficulties in following up the husband. If she then goes to a district court for the purpose of starting criminal proceedings for nonsupport she finds in some districts that the judge of the probate court or the judge of the district court, or both, understand the law to mean that if one court has taken jurisdiction of the case the other court should not take jurisdiction, and she is left without an effective remedy in either court. In some cases we understand that district court judges will not act unless a decree of the probate court granting separate support is revoked.

In our opinion, there is no ground for such an interpretation of the statutes. The fact that a civil proceeding in the probate court is pending, or may be brought, has no more effect upon the jurisdiction of the district courts to entertain a criminal proceeding for nonsupport than a civil proceeding, for instance, to recover the value of property stolen affects the jurisdiction of a criminal court to entertain a prosecution for theft. A civil proceeding cannot bar the public from prosecuting in the criminal court. This is the sound view taken in practice by a number of district courts, and, where this view is taken, the criminal case proceeds.

There is, however, a further difficulty. If the woman has been advised to begin her proceedings in the probate court, and obtains a decree for separate support and then finds that she cannot collect it, when she goes to the district court in a criminal proceeding she has to prove her case over again because of the fact that the civil decree in the probate court is not under the present law admissible in the criminal proceeding as evidence of her right to live apart.

Again, in the matter of custody of children, the probate court has authority to appoint a guardian of any minor children, whether the parents are living together or not, to have the care and management of the property of the children, and, if it finds the parents to be unfit, to award the custody of the children to

the guardian. As already pointed out, also, the probate court has the power to award custody of children as an incident to a decree on a petition for separate support. The district courts, however, having only criminal jurisdiction of proceedings for nonsupport, cannot award either a restraining order against the husband or custody of children, or an order giving the wife freedom to deal with her own property. They can only find the fact that the living apart is justifiable as an incident to enforcing contribution toward support.

The statutes in regard to separate support above described in the probate courts and district courts result in occasional unfortunate results to the parties concerned.

We think that it is advisable for the probate courts to retain this jurisdiction for such persons as prefer to bring such proceedings in that court, but we see no reason why the district courts should not be given jurisdiction to act fully in the matter in all cases in which a prosecution for nonsupport is begun, on petition by the wife, or by any person on behalf of the children, praying for a civil decree establishing such domestic relations as the probate courts may now establish.

In view of the existing difference of opinion already referred to on the question whether civil proceedings in the probate court bar the jurisdiction of the district courts of a criminal proceeding for nonsupport, we suggest that the doubt and its unfortunate results should be brought to an end by a declaratory statute that such proceedings are no bar.

We think that these provisions will take care of most of the cases in which confusion now occurs. There is still, however, the question of a rehearing in the district court, on a proceeding for nonsupport, of the whole case in those instances in which there has already been in the probate court a decree establishing those rights. In such cases, so far as the civil right to live apart is concerned, and the custody of children, and even as to the amount to be paid by the husband, the decree of the probate court would settle the matter. In that respect, a decree of the district court under the civil jurisdiction, herein recommended as an incident to a criminal proceeding for nonsupport, would have the same effect of excluding the jurisdiction of the probate court. In either case, however, the question

would arise in the criminal proceeding in the district court as to how far the decision would be admissible against the husband.

To meet this difficulty we recommend a provision that the decree of the probate court or of the district court, rendered after personal service, establishing the right to live apart and to have the custody of the children, on petition by the wife, shall be admissible as evidence in the district court proceeding for nonsupport, except as to the amount to be paid, for failure to pay which the force of the criminal law is invoked. While the changes suggested will not produce a perfect situation, we think they will greatly improve the present arrangements.

We submit a draft of the statute which we recommend.

The Proposal to create a Court of Domestic Relations.

The proposal to create a court of domestic relations which shall have jurisdiction of all family matters such as divorce, separate support, nonsupport, custody of children, juvenile jurisdiction, and the discipline of children, etc., is receiving more and more attention in current discussion, both as a matter of "social" interest of a humanitarian character, and as a matter of administration to avoid the division of family problems which results from the existing plan of dealing with problems of the same family in different courts.

Aside from the objections to creating any more separate courts, there is much that can be said in favor of such a plan, but it would involve a very considerable reorganization which we are not prepared to recommend at this time, but which we believe to be worthy of future study.

6. Equitable Process after Judgment for Labor and Necessaries.

It has been suggested that the procedure relating to the collection of judgments may be simplified in the interests of justice. As far as the revision of the Poor Debtor Law, relating to the collection of judgments in general, is concerned, that is discussed hereafter.

Ever since 1898 the State has maintained a policy of making

special provision for a more direct and effective proceeding to enforce payment for claims of necessaries furnished or for labor performed, with authority in the court to order payments by installments, and to make other orders which justice may require on the particular facts of each case, with a view to securing a payment of the judgment and at the same time protecting the debtor and his family from undue pressure by the creditor. This process has been known as equitable process after judgment.

In the first report of this Commission filed in January, 1920, the provision that the justices of the district courts should make rules for a simple and inexpensive procedure for the collection of small claims not exceeding $35 was recommended in the interests of poor people who wished to collect claims without unreasonable expense and was adopted.

The law, which we are now discussing, had much the same purpose as the law about small claims, *i.e.*, it was for the protection not only of small shopkeepers and others who had provided the necessaries of life, and of laboring men who had performed services, but also of poor people for whom these services had been performed, and who, from unfortunate circumstances, might be reduced to utter destitution, however honest they might be, unless there was some protection provided in the form of a court order for gradual payments, and a prohibition of attachments of wages pending the proceedings. For this reason, as well as because of its form, the procedure has been known as "equitable" process, and the same policy was adopted by Congress during the war for all the courts of the country in the Soldiers' and Sailors' Civil Relief Act, for the protection of the men in service and their families against undue pressure from creditors. We believe that, if the judges of the district courts, as a result of experience, can simplify and render less expensive and more direct the existing procedure in regard to judgments for necessaries and labor performed, they should be given specific authority to do this by rule, as this is one of the subjects referred to in the earlier discussion of rule-making power which we believe can be better regulated by rule than by statute.

This "equitable process" in these cases was substituted for

the remedy of arrest for debt under the Poor Debtor Law, the process being for the protection of the debtor as well as the creditor. We see no reason why the debtor should not be expected to satisfy the court as to his circumstances, and show cause why he should not be ordered to pay the judgment in full or by partial payments instead of the present practice, under which we understand that the burden is on the creditor to show that the debtor can pay.

We accordingly submit a bill to carry out the foregoing recommendations.

7. The Poor Debtor Law.

In the report of the Municipal Court of the City of Boston, made in 1916, and printed as a city document, appears the following statement in regard to this law: —

> It seems a fair comment that what was originally intended to be a simple procedure, devoid of technicality, has in practice become highly technical and a trap for the unwary. The chief causative factor is legislation in extreme detail, reducing to the point of extinction the rule-making power of the court, which might otherwise be used for relief from hard conditions, a consideration by no means limited to this branch of civil business. An attempt on the part of a genuinely poor debtor to secure relief through the poor debtor's oath without the assistance of counsel is a perilous adventure. The attention of the creditor is focused quite as much upon the opportunity to catch his adversary napping, and thereby transfer the debt to the shoulders of a friendly surety, as upon any real examination into the debtor's finances. The main objective is possession of the debtor's person upon the execution.
>
> The situation has been somewhat ameliorated by the power lately given to remove nonsuits and defaults in proceedings upon the creditor's application, but it is believed that a more efficacious remedy would be to restrict imprisonment to that ordered by the court upon an adjudged contempt of its orders. . . .
>
> The question of review of matter of law arising in these cases is one deserving attention. Substantial amounts may be involved, since the court deals with executions from courts of unlimited jurisdiction. Except in the rare cases of appeals from findings of guilt upon charges of fraud, the only method of legal review is through extraordinary writs from the Supreme Judicial Court, which are increasing substantially in number. It is worth consideration whether a cheaper and more suitable form of review should not be given by allowing the municipal court at least a discretionary power to report such questions of law to its appellate divi-

sion, leaving the parties a right to extraordinary remedy only after refusal so to report. This work frequently develops genuinely difficult legal questions, by no means wholly procedural, for which some inexpensive method of correcting legal error is necessary.

The report referred to shows the following poor debtor entries in the Boston Municipal Court: in the year 1913, 2,603, equitable process, 56; in the year 1914, poor debtor entries, 2,565, equitable process, 55; in the year 1915, poor debtor entries, 2,481, equitable process, 49. Since 1916, when the foregoing report appeared, the court has changed the practice as to granting continuances by denying them except for cause shown, and treating the process as one for prompt oral examination, instead of allowing it to be used, through the practice of continuances, as an indirect method of securing payment by instalments, with the possibility of catching the debtor in some technical slip, and thus getting an opportunity to charge his sureties. The poor debtor entries since 1916 have been as follows: 1916, 2,572; 1917, 2,424; 1918, 1,551; 1919, 1,443; 1920, 1,626; the equitable process entries: 1916, 47; 1917, 58; 1918, 65; 1919, 51; 1920, 37. The smaller number of entries in the last two or three years is presumably accounted for largely by the temporary war prosperity, and, to some extent, probably, by the change in practice above mentioned. The figures for 1920 show that the number of entries is beginning to increase again.

The poor debtor law, as pointed out in the foregoing extract from the report referred to, is in a complicated technical condition, which offers opportunity for abuse and does not provide the court with the power to protect men against abuses. We believe that the district courts should be given such power. A carefully drawn bill was introduced and came near enactment in 1915 (see Senate, No. 518, 1915, as amended by the House). This bill, of which the latest draft was House, No. 617, 1919, was framed to preserve the right to arrest on mesne process where now allowed, and to substitute for the present proceeding after judgment equitable process for the collection of the judgment similar to that relative to judgments for necessaries and for labor performed, which has existed ever since 1898. The central feature of this plan is to provide the court with authority to make orders for payments of judgments by

instalments reasonably adapted to the condition of the debtor and of those who are dependent upon him; to protect the debtor if he complies with such orders; and to enforce the compliance with such orders by commitment for contempt. Substantially similar procedure has also existed in the probate courts in connection with separate support. The provision for payment by instalments is one of the main features of the Soldiers' and Sailors' Civil Relief Act, and it is the main feature of the criminal proceeding for nonsupport under which hundreds of thousands of dollars are annually collected through the district courts for the support of dependent wives and children. This proceeding for nonsupport, while criminal in its form, is really a proceeding for the enforcement of civil liabilities under penalty of imprisonment. Its criminal form results merely from the interest which the public has in enforcing the duty of a man to contribute to the support of his family, and thus prevent their becoming public charges.

If the Poor Debtor Law is to be revised, we believe that it should be revised along the lines of preserving the right of arrest on mesne process, in order to secure jurisdiction of the person and property of a debtor, who is likely to run away, and thus to protect his creditors, if they succeed in getting judgment against him, in their right to his appearance for examination after judgment into his circumstances in order to collect the judgment. The people of Massachusetts have an interest in retaining the procedure for the collection of debts with the right to arrest on mesne process, as above explained. Such procedure has always been maintained here against all attempts to abolish it, and we believe that, in its larger aspect, the interests of the people as a whole call for the continuance of the policy which has given the State a reputation before the country as a place where men are expected to pay their debts. We believe that a law based on this policy is a very healthy and effective prevention against fraud. But we believe that the proceeding after judgment can be improved if it be developed along the lines already suggested, to provide not only protection to the creditor in his right to payment, but reasonable protection to the debtor and those dependent upon him from oppression by the creditor.

In view of the complicated character of the present law, we believe that this may be one of the subjects in which the rule-making power of the district courts might be wisely extended as the better method of working out detailed regulations. The general outline preserving arrest on mesne process, defining the occasions when it may be resorted to and connecting it with the supplementary process after judgment, should be provided by statute, and the details of administration after judgment developed by rules of court. We believe the whole subject should be considered by the judicial council, if it is created.

8. Juvenile Jurisdiction.

This, as well as the probation system, has been, and is still, the subject of vigorous discussion and disagreements. The problem of tempering punishment, not merely with mercy but with some practical plan of fostering whatever real chance of reform there may be in individual offenders, while difficult enough in all cases is peculiarly so in juvenile cases. The policy of juvenile courts has come to stay, and the disagreements now are mainly in regard to details of administration.

The administrative problems will be somewhat different in large cities from those in less thickly settled communities. The personality and practical good sense of the judge and of the probation officer who assists him are the most important factors in the exercise of this jurisdiction.

Various suggestions have been made in regard to juvenile courts. One is the provision for circuit juvenile judges, specially qualified by experience for juvenile work, who should travel about in different districts of the State to deal with such cases. The argument in favor of this plan is that the 72 judges and the 140 special justices of the district courts naturally vary greatly in their capacity for dealing wisely with juvenile cases. This is doubtless true, but we do not believe in the general policy of creating new courts of special jurisdiction. We think the problems of the administration of juvenile jurisdiction, like other problems of jurisdiction, should be studied in the judicial council, which we recommend.

In Boston there is a special juvenile court for the central district which has rendered very valuable service in experimenting in this field of work. Suggestions have been made that its jurisdiction should be extended to cover the whole city, and that it should be consolidated with the other Boston courts. These proposals meet with opposition similar to that which arises in connection with the other proposals as to the consolidation of Boston courts referred to elsewhere in this report.

9. Special Justices of District Courts.

First, we believe the question whether the office of special justice of the district courts should be abolished, except in the larger centers where they are frequently needed, deserves the serious consideration of the Legislature. We have no information as to the details of business, and the amount of time required to do it in the various courts, on which to base a more specific recommendation, and it is doubtless true that in some of the courts the work requires special justices so long as the present arrangement and distribution of these courts is continued. One of the most serious objections to any plan for developing these courts is that men who would be reasonably satisfied with the findings of fact of many of the regular judges, and would be willing to present more cases to them in which juries were not wanted, cannot be sure that the regular judge will sit, and they are not always satisfied with the special justices. In spite of the fact that there are many competent special justices, the existence of the office seems to be one of the main obstacles to the development of these courts into more effective tribunals. We believe that it would be a better investment for the public if sufficient salaries were paid to a sufficient number of regular judges to do the work in the different localities, with the right to call in a justice of some other district if necessary in case of emergency such as illness, etc., abolishing the office of special justice whenever possible.

Second, General Laws, chapter 218, section 17, now provides that, "A justice, clerk or assistant clerk of a district court shall not be retained or employed as attorney in an action, complaint or proceeding pending in his court, or which had

been examined or tried therein; and a special justice shall not be so retained or employed in any case in which he acts or has acted as justice."

We recommend that this statute be extended so that a special justice shall not act as attorney in any case in his own court, and submit in Appendix A a draft of an act for this purpose.

10. The Boston Courts.

There are eight district courts and a central juvenile court in Suffolk County, besides the central court, which is called the Municipal Court of the City of Boston. These courts are described in detail in the report of the Commission on the Inferior Courts of Suffolk County (House Document No. 1638, 1912, pages 5, 6). The current appropriations for the various courts of Suffolk County covering "personal service," "service other than personal," "equipment," "supplies," etc., as shown by the city auditor's monthly exhibit for Oct. 1, 1920 (City Document No. 94, 1920, pages 24–28), are as follows: Municipal Court of the City of Boston, $285,208.37; Municipal Court, Charlestown District, $25,185.35; East Boston District Court, $20,934.20; Municipal Court, South Boston District, $19,769.43; Municipal Court, Dorchester District, $17,520.57; Municipal Court, Roxbury District, $42,735.27; Municipal Court, West Roxbury District, $15,969.03; Municipal Court, Brighton District, $9,587.05; Boston Juvenile Court, $22,324.62; Police Court, Chelsea, $18,378; total for Suffolk courts, *other than the Municipal Court of the City of Boston*, $192,401.52.

The question whether these courts should continue as separate institutions or be consolidated with the central court has been discussed before the Legislature for many years. As Boston has developed as a large modern city the importance and advantages of centralization have been urged with increasing emphasis. The work of the courts other than the central court is almost entirely in criminal matters, practically all of the civil business being brought into the central court because of the greater convenience for attorneys. It is probable that the civil business in the outlying courts will increase somewhat under the Small Claims Act, which goes into effect in

January, 1921, because attorneys will generally be unnecessary for such claims, and the parties will naturally apply to the nearest court house in the neighborhood. But this fact does not furnish an argument for isolated courts, as the local court houses could still be used by a consolidated court. The considerations on both sides of this question of consolidation have been urged upon the Commission, and it has been suggested by the Boston Finance Commission and others that the Commission should investigate the relative amount of business and the time and expense required to do it.

In view, however, of the number and scope of the questions before the Commission, and the limited time for their consideration, and especially in view of the repeated consideration of the question by the Legislature during a period of over forty years, and the repeated investigations and reports on the subject, it has not seemed wise for the Commission to undertake such an investigation any more than it has been to make a similar investigation of the sixty-four other district courts. Accordingly we refer to the previous studies of the subject.

The Commission of 1876 recommended that the courts be consolidated (see Public Document No. 32, 1877, pages 8–10) and said: —

> . . . it should be remembered that the existing system of courts in the city is not the result of a well-defined plan made for the city as it is now bounded, but is a piece of patchwork, resulting from the fact that the city has grown to its present size by the annexation of adjacent cities and towns, in some of which police or district courts were already established, while in others municipal courts have been created without careful consideration of the relation existing between the wants of the districts and the cost of the institution.

The recommendation was not followed, but the civil jurisdiction of the central court was later extended throughout the county, and experience has justified this change, as practically all the civil business has come to the central court.

The consolidation was again recommended by the joint legislative committee of 1886 (see Senate Document No. 10, 1887, pages 11, 12).

It was again recommended with peculiar force in 1912 by the

Special Commission on the Inferior Courts of Suffolk County (see House Document No. 1638, 1912). The most recent recommendation to the same effect was by the Finance Commission in its report of Feb. 11, 1920, to the mayor of Boston, already referred to.

The reasons given in these discussions seem to the Commission very forcible in favor of consolidation. If the problem were one of an original plan for the courts of a large city like Boston we do not believe that ten isolated courts would be created. It would not be considered a good business arrangement. Without a more detailed examination of these courts than has been possible we can add nothing to the previous reports referred to.

But assuming that these courts are to continue, we have to consider what improvements may be made on that assumption, and they fall into the general class of district courts outside of Boston, with the exception of civil appeals. The civil business in these courts is so small in amount, and the appeals so few in number, that if the general plan which we recommend as to civil appeals in district courts is adopted, the appeals in all the Boston courts should go to the existing appellate division of the Municipal Court of the City of Boston, instead of attaching the Boston courts to another appellate district. We have included a draft of a section for this purpose in the general act about civil appeals.

11. The Counties of Nantucket and Dukes County.

These two island counties raise peculiar questions.

Each has a probate court with a judge and register of probate, a register of deeds and a district court and a clerk of courts.

The Supervisor of Administration, in his report in 1919, recommended that the probate courts in the two counties be abolished upon the resignation, or retirement, of the present incumbents, and that they be added to the jurisdiction of the judge of probate of Barnstable County.

We think that a better plan would be to consolidate some of the offices. Each county has had its own probate court for over

two centuries. We think their geographical situation entitles the inhabitants of each county to a local judge. This is particularly true of Nantucket, which is 25 miles out to sea, and at times in winter is cut off from communication with the mainland.

We do not, however, believe there is business enough in either county to warrant a separate probate and district court. Accordingly, the situation in Boston more than a century ago seems to suggest a solution.

In the "Law Reporter" for December, 1839 (Vol. II, No. VIII), appears an account of the early courts in Suffolk County. The first Municipal Court of the Town of Boston was created in 1799.

> The first judge . . . was George Richards Minot, Esq., who at the time of his appointment was Chief Justice of the Court of Common Pleas, and Judge of Probate for the County of Suffolk. In 1800 he resigned the chief justiceship and accepted the commission as Judge of the Municipal Court and he presided therein and in the Probate Court until his much lamented death in 1802. . . .
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> In 1802 the Hon. Thomas Dawes resigned the office of a judge of the Supreme Judicial Court and accepted contemporaneously the vacant offices of Judge of Probate and Judge of the Municipal Court. He presided at the latter court just twenty years and in the Probate Court a few years longer.

There is nothing in the Constitution to prevent this. Article II of Chapter VI says that —

> No person shall be capable of holding or exercising at the same time, within this state, more than one of the following offices, viz.: judge of probate — sheriff — register of probate — or register of deeds; and never more than any two offices, which are to be held by appointment of the governor, . . . justices of the peace excepted, shall be held by one person.

There is no greater difficulty in consolidating these two courts than in uniting the judgeship of both courts in one person, and there is nothing in the Constitution to prevent it. Neither Chapter VI, Article II, nor the Eighth Amendment relating to incompatibility of offices, affects in any way the legislative power to create and abolish courts, or to transfer jurisdiction from one to another.

If, and when, any change is contemplated we suggest that the Legislature consider the consolidation of the probate and district courts, and create for each of these counties a court with the jurisdiction of a court of probate and insolvency, and also with the jurisdiction in civil and criminal matters of a district court; and the consolidation of the office of clerk of courts and that of register of probate and insolvency, so that there shall be one judge and one register or clerk for the entire judicial work of each of these counties.

If such a plan should be adopted we suggest that the name of these courts should be "The Probate and District Court of ."

Another possible plan would be to abolish the existing district court in each county, and to transfer its jurisdiction to the existing probate court, changing the name of the probate court as above suggested. This plan has the advantage of involving the abolition of only one court, and, if there is to be a choice in that respect, the probate court, which is the older institution, and for which in all counties there is a special local desire, would be the natural court to retain.

Having made no special investigation of the amount of business done by the various officials, we make no recommendation in regard to the matter, but simply make the foregoing suggestions for the consideration of the Legislature, in view of the recommendation of the Supervisor of Administration above referred to, that the probate courts in these counties should be abolished. This does not seem to us advisable.

12. Abolition of the Name "Police" Court.

It has been suggested by men of experience, and the Commission believes, that the name "police" court should be dropped, on the ground that it is not a good name for any court having civil jurisdiction, because it suggests a criminal atmosphere to the minds of many unfortunate persons who enter it on civil business. It seems unnecessary to go into any further demonstration of the reasons. The courts now named "police" courts should be named "district" courts.

A draft of an act to accomplish this change is annexed in Appendix A.

III. THE HIGHER COURTS.

1. The Supreme Judicial Court.

(*a*) *The Number of Judges.*

Ever since 1873 the Supreme Judicial Court has consisted of seven judges. By section 2 of chapter 211 of the General Laws a majority of four constitutes a quorum of the court for appellate work when the court sits as a full bench. Ordinarily, however, five judges sit to hear arguments on appeal.

At the time the Constitution was adopted, in 1780, the court consisted of five judges. In 1799 the court was increased to seven, and sat in two divisions of three each at the trial of jury cases which were then tried before that court. This was to enable the court to sit more frequently in different parts of the State, which then included Maine, at a time when they had to travel by carriage or on horseback. Later, it was provided that two judges could hold a court. In 1804 the court was reduced to five. Thereafter the number was altered from time to time until 1873, when the court was increased to seven.

It is apparent, therefore, that the court has stood as a small court for over one hundred and forty years, and as such, with the longest continuous existence of any court in the country, it has acquired a deep-seated respect and prestige in the minds of the people of Massachusetts, which we believe to be one of the greatest elements of strength and value in the government of the Commonwealth in the interests of all its people. We believe that it would be a serious mistake to enlarge the number of this court.

It has been suggested to the Commission that the court should be relieved of all its trial work, which now practically consists of the hearing of equity cases and petitions for writs of mandamus and other prerogative writs, and that the work of the court should be confined to the decision of questions of law upon appeal. It has been said that if this change should be made the court should be reduced to five judges as vacancies occur. Many have favored the plan of confining the work of

the court to the hearing of appeals, but many others are vigorously opposed to such a change, believing that it is better for the judges to sit occasionally to hear cases in the first instance, instead of being removed entirely from such work and confined to the consideration of questions of law. They believe that it is desirable that appellate judges should be kept in touch with the hearing and decision of questions of fact from time to time.

The Commissioners think that this is desirable as long as practicable. In view, however, of the gradual increase of the work of deciding law questions which is likely to occur, the Commissioners have recommended elsewhere the enlargement of the concurrent jurisdiction of the Superior Court to cover most of the subjects of which the Supreme Judicial Court now has exclusive jurisdiction, and they have also recommended a provision enlarging the powers of the justices of the Supreme Judicial Court to transfer cases to the Superior Court for hearing in whole or in part.

While there are many cases of importance involving difficult and serious questions of law, arising either in equity or upon prerogative writs, in which members of the bar naturally prefer a hearing directly before a justice of the Supreme Judicial Court, there are also cases brought in that court which might well be heard in the Superior Court. It is to be hoped that if some of the other recommendations of the Commission in regard to the procedure and practice in other courts are adopted the increase in the appellate work will be checked, and that the court will be in a position to exercise its fair judgment as to those cases which, from their nature, reasonably warrant an original hearing before them. If, however, there sould be such an increase in the work of deciding questions of law as to require that the court be relieved of its work in the original hearing of cases, then the court might, perhaps, be reduced to five judges, but, until that time comes, we think the present number should be retained. For constitutional reasons any reduction in the number of the court, of course, can be made only upon the occurrence of a vacancy.

The court has always been scrupulously careful that a judge who may happen to have a possible interest in the

result of litigation before the court should refrain from sitting. This, or illness, may at times reduce the number of available judges for the hearing of appeals, and, in view of the fixed requirements that single justices of the court shall sit at different places in the Commonwealth, it might not be possible to hear a particular case at the time when it was reached for argument because of the lack of the necessary number of judges available. It is desirable that this should not happen, and it has been suggested that in such cases the chief justice should be allowed to call in a justice of the Superior Court to sit in the Supreme Judicial Court upon the hearing of appeals, or to sit at the original hearing of cases brought in the Supreme Judicial Court, in place of the judge under assignment for that purpose. This plan has much to recommend it. The only objection to it appears to be a constitutional question as to whether a judge, who has been appointed and commissioned to sit in the Superior Court, can legally sit in the Supreme Judicial Court; but we doubt the validity of this objection. Certainly, as far as the hearings before a single justice are concerned, a judge of the Superior Court, thus called to sit in the Supreme Judicial Court under legislative provision, would simply be exercising in one room of the court house, called the Supreme Judicial Court, jurisdiction which he already has, or which the Legislature has undoubted power to confer upon him, if he exercised it in another room of the court house, called the Superior Court. There can be no question, therefore, that this elastic arrangement would be constitutional in those cases.

When it comes to a justice of the Superior Court sitting upon questions of final appeal with a full bench of the Supreme Judicial Court, a somewhat different question arises because of the fact that the full bench of the Supreme Judicial Court, being a court of last resort, it might be argued that it cannot be composed of any justices other than those appointed and commissioned directly as members of that court. On the other hand, it may be said that the Legislature, under the power "to establish judicatories and set forth the powers and duties of officers," may make such provisions that a justice of the Superior Court may be called upon to sit temporarily in the

Supreme Judicial Court, even on appeals if the interests of justice so require.

However, we think it wiser to avoid the doubt and to provide merely that a justice of the Superior Court could be called upon to sit in the Supreme Judicial Court only as a single justice to hear such cases in the first instance in that court, but not to sit as a member of the final court of appeal. We believe that such provision will be sufficient to meet any contingency of the kind suggested. Such arrangements when necessary would doubtless be made as a result of consultation between the chief justices of the two courts in such a way as to interfere as little as possible with the work of the Superior Court.

A draft of an act for this purpose is submitted in Appendix A.

(*b*) *The Sittings of the Full Bench of the Supreme Judicial Court.*

The joint special committee of 1859, which recommended the creation of the Superior Court, said in its report (House, No. 120, 1859): —

> We propose to open the doors of the Supreme Judicial Court, for hearings in law and equity, in the city of Boston on the first Wednesday of January annually, simultaneously with the assembling of the Legislature, and to keep them open throughout the year. We provide for but one term. The entry of all questions to be heard in that court is to be made in Boston. They may be sent from the distant parts of the Commonwealth by express, or by mail or otherwise. But we report nothing to prevent the court holding terms at any place other than Boston, if in their judgment the public interests should render it proper. Upon the court the Legislature casts the responsibility of hearing and deciding all questions of law that may arise, promptly and without delay. As theirs is the labor, they can best devise the manner and appoint the times and places of doing it. We hamper them by no stated terms. And this is done that the great and needed reform may be secured, to wit: a speedy hearing of all law questions as they arise.
>
> It is believed, when this system comes to be fairly tried, that all questions of law will reach argument and decision in the Supreme Court within two months, at least, after the trial in the Superior Court, and thus the counsel of the respective parties will come fresh from the jury trial, with their arguments and zeal unabated by reason of having forgotten the case, to argue the questions before the court of law.

The statute which they recommended was as follows (see page 34 of the report, section 36): —

> A law term of the Supreme Judicial Court shall be held at Boston on the first Wednesday of January of each year, which term may be adjourned from time to time to such places and times as may be most conducive to the dispatch of business and the interests of the public.

This recommendation was not followed by the Legislature, and the discussion whether the judges of the Supreme Judicial Court should be required to travel about the State has continued from time to time ever since 1859, the latest discussion being the article by Hon. William C. Loring explaining the practical situation of the court in regard to these sittings during the long period while he was a member of it (see 5 Massachusetts Law Quarterly, p. 65). For tables showing the relation between time spent and business done from 1906 to 1915, see I Massachusetts Law Quarterly, pages 45 to 48.

The Legislature of 1920 dealt with this subject by chapter 386, providing for a sitting once in each year in Pittsfield, Springfield, Worcester and Taunton, and once in alternate years in Greenfield and Northampton, with the proviso that —

> When no case has been set down for oral argument at least two weeks before the day determined for any of the said sittings, the sitting may be omitted; and if only one case shall have been set down for oral argument, that case may be transferred to any other of said sittings which may be most convenient or accessible for said parties or to a sitting for the commonwealth if the parties so agree. (See General Laws, ch. 211, sect. 13.)

This statute will help the court to some extent, but does not help the parties. The question still remains whether it is good for the clients to be obliged to wait a year before having their cases argued before the full bench if they wish to have them argued orally, unless their cases happen to be ready for hearing upon the day fixed for the sitting in their particular county.

Cases may be submitted to the full bench on briefs without oral argument at any time under the present rules, but, if oral argument is desired, as explained by Judge Loring in the article above referred to, it is not practicable, so long as the time of the court is taken up in traveling to certain fixed sittings, to

arrange for oral argument in Boston of cases from other parts of the State. If the requirement of fixed sittings were entirely discontinued the court could arrange its work more in accordance with the convenience of the bar and of the clients, with a view to carrying out as far as possible the hope expressed by the committee of 1859, in the passage above quoted, of the prompt hearing of appeals, although two months, there mentioned, is rather too short a time to expect.

As a result of the hearings held in Springfield, Pittsfield, Greenfield and Northampton, the Commission has found a marked change in the attitude of many members of the bar in those places in regard to this question, and the general sentiment expressed in those meetings was in favor of leaving the matter of sittings of the full bench entirely to the discretion of the Supreme Judicial Court. A few were opposed to this plan, but a great majority of those present at the hearings, which were well attended, favored the change, and felt that the opportunity to present their cases at several different times during the year, under some convenient assignment by the court of different days for counsel from distant counties, would be much better than the present necessity of waiting a year for an opportunity for oral argument.

Accordingly, we recommend that the Legislature should go further than chapter 386, Acts of 1920, and should carry out the plan recommended by the joint committee of 1859, of placing the whole matter in the hands of the court, and we submit a draft of legislation for this purpose.

(c) *Secretaries and Clerical Assistance for the Justices of the Supreme Judicial Court.*

The seven justices of the Supreme Judicial Court are doing their important work to-day with less assistance than is at the command of young members of the bar in many law offices. The work of the court is being done under conditions similar to those of forty years ago, before the division of labor became necessary to meet the demands of business in general practice, and when lawyers wrote letters, documents, etc., in long hand, and many of them had an office force consisting of an office

boy. The private business of the community could not be done under those conditions to-day. The physical work involved in the careful study of the facts and law would be too great. The preliminary work, the examination of law, and the analysis of facts of a case in busy private offices to-day are done by juniors, who prepare careful reports which are then studied and tested by their seniors, and a further investigation directed if necessary before a conclusion is formed, an opinion delivered, or an important document prepared.

It is not a good business arrangement for the Commonwealth in the interest of the public, nor is it fair to the judges themselves, to use up so much of their time and strength in this way. They ought to have adequate assistance adapted to the needs of modern business, so that their strength and judgment may be devoted to the careful consideration and decision of causes before them, if the business required of a modern court is to be done promptly and also maintained at the high professional standard which Massachusetts maintains.

The Commonwealth now provides only two stenographers and part of the time of a third for seven judges. One of these stenographers is constantly engaged in the equity session presided over by a single justice. The chief justice has one stenographer whose compensation is only partly paid by the Commonwealth. That leaves only one stenographer for the greater part of the time to do the work of the other six judges of the court. We do not believe that the bar in general or the community realizes this fact, or that they wish this situation to continue. A judge who is promoted from the Superior Court to the Supreme Judicial Court finds that he has less clerical assistance above than he had below.

The judges of the Supreme Court of the United States and the judges of the Court of Appeals of New York are each of them provided with assistants. Part of the work of the assistants is to examine the voluminous records in cases before the court, and prepare a report for the judge, and, in the same way, to examine briefs on both sides, look up cases, and prepare a report on the briefs. The judge can then take the records and the briefs, and, with the aid of these reports, can get at the substance of the case much more readily and with less physical

labor, so that his mind is fresher and is in a condition better adapted to reach a sound conclusion more quickly than if he were obliged to wade first through a large amount of irrelevant matter.

Under our present practice on appeal before the Supreme Judicial Court the oral arguments are more perfunctory and less interesting or helpful than they should be. The court comes to the argument without any knowledge of the case, the judges examine the printed record while the argument proceeds, and the value which may be obtained from vigorous oral discussion is, to a considerable extent, lost. Yet, with the pressure of business, no other method seems practicable unless the judges are given adequate assistance of the kind already outlined, so that the representatives of the Commonwealth on its highest court shall be in a position in which it is possible to give the State the best of their ability in a simple, natural way under conditions adapted to modern business. Most public officials in other departments of the government are provided with adequate assistance, but the justices of the Supreme Judicial Court are left to do their work as above described, while the demands upon them are constantly growing, and the nature of their work, both in the decision of causes and rendering advisory opinions to the legislative and executive departments of the government, is of the most far-reaching importance.

The Commission recommends that adequate appropriation be made for the employment of two or more secretaries and sufficient stenographic assistance for the court, and we believe that if our recommendations in this report are carried out, the work of the court will be such that each one of the justices may require a secretary.

(*d*) *The Quarters of the Supreme Judicial Court.*

By chapter 22 of the Resolves of 1920 the Legislature created a commission to investigate the question of erecting a new building for the State Library, Supreme Judicial Court and the Department of Education. This commission is to report to the next Legislature. The question whether such a new building shall be erected is, of course, not within the scope of the inquiry of the Judicature Commission, but the question whether the

present quarters of the Supreme Judicial Court are adequate is a matter which seems to be within the present inquiry.

If the question of new quarters is to be considered, it is essential that an adequate law library, such as the State Library, should be closely connected with the court, as the Social Law Library is at present, and sufficient space provided for future needs. We have inspected the quarters of the Supreme Judicial Court and do not consider them at all adequate when the nature and importance of the work of the court are considered.

While we do not feel that it is our function to make recommendations as to the proposal for a new building, yet we do feel that we should express our opinion as to the inadequacy of the present quarters.

(e) The Need of an Appropriation for printing Proofs of Opinions before they are adopted.

Ever since the beginning of the recorded history of American law, one fruitful source of litigation has been the appearance in reported opinions of dicta or language the meaning of which has not been clear to the bar, and which has not always been required for the decision of the case. Because such language has not always received the same careful consideration given to the points actually decided, doubts have arisen as to the real state of the law, which have resulted in needlessly interfering with ordinary business, or have furnished the basis for lawsuits. This must happen occasionally in any event, and the present discussion is not intended as a complaint or a criticism of any court. Every court occasionally says things which are not clear. No human beings can avoid it. But with the present output of judicial opinions, and the growing interest all over the country in the study of methods which will result in the elimination of unnecessary litigation and the more effective disposal of business, it is important to consider whether there may not be a practical method of reducing to a minimum this particular cause of litigation and uncertainty in the law.

The judicial practice in regard to opinions has developed along different lines in England and in this country, and the

practice in each has its advantages and disadvantages. In the English courts it has been, and still is, the practice for each judge sitting on the court of appeal to deliver his individual opinion. The advantage of this practice is that it places greater responsibility upon each judge, and the bar understands more clearly the agreements and disagreements of the court in regard to the questions involved. This sense of responsibility is increased by the practice of the English judges of delivering their opinions orally at the close of the argument in most cases. The disadvantage is that it tends to increase somewhat the volume of opinions and often involves repetition.

In America the practice of delivering oral opinions never developed to any great extent, and, although in earlier years it was common for the different judges to prepare separate opinions which were published, this practice also has been generally discontinued except where there are dissenting opinions. Separate opinions are more common in the Supreme Court of the United States to-day than in other courts.

On the whole, the prevailing American practice is probably better adapted to the courts of this country than the English practice. One reason for this is that in most American courts of appeal there are ordinarily at least five judges sitting upon each case, while in England the great majority of appeals are heard and decided by three judges.

We understand that it is the practice of the Supreme Court of the United States to have each opinion set up in proof and submitted to each judge before it is adopted, and that sometimes a number of revised proofs of the opinion are thus submitted. This practice has the advantage of enabling each judge, not only to read and consider all the statements in the opinion, but to see it set up in type. Every lawyer knows that the test of reading something in type is a practical test which is most effective in concentrating his attention upon the different parts of a statement thus printed. It seems important that opinions should be printed before they are adopted, in order that each statement and all the reasoning may be fully appreciated by each judge.

We recommend that the necessary appropriation be made for this purpose.

(f) Methods of presenting Cases to the Full Bench on Exceptions or Appeal.

There is frequent criticism of the existing method of presenting cases to the full bench of the Supreme Judicial Court. Most cases come before that court on report, appeal or exception. The record of the case containing the pleadings, accounts of the trial in the court below, and a specification of the questions of law to be decided is printed so that each justice of the Supreme Judicial Court may have a copy of the printed record before him. Briefs on each side are usually printed. The cost of printing the record is paid, in the first place, by the appealing or excepting party, and this cost, and to some extent the cost of printing a brief, is ordinarily taxed against the losing party when the case is decided. In many cases in which the record is long these printing bills amount to a considerable sum.

In the preparation of the record to be thus printed in those cases in which much of the evidence is included in the record, especially when the question is raised, "whether on all the evidence" the verdict is warranted as a matter of law, it is required that the bill of exceptions shall be prepared in "narrative form," with a view to reducing as far as possible the volume of the evidence. This requirement gives rise to controversy and wrangling over what is called "settling the bill of exceptions." The bill of exceptions, before it is sent up to the Supreme Judicial Court, has to be approved by the judge before whom the case is tried. But it is obviously impossible, in view of the other work of the judges, that each judge should himself prepare the bill of exceptions. It has to be prepared ordinarily by counsel on both sides as far as they can agree, and, when they cannot agree, they submit the disputed questions to the judge for decision.

This method of the preparation of cases, while it is obviously more convenient for the appellate court, has been criticised as causing much delay and friction between counsel, and as inviting the natural tendency on the part of counsel on one side or the other, in a partisan frame of mind, to "give color" to the story in some way or other.

One way of avoiding this difficulty would be to adopt the

practice prevailing in other courts. In Ontario the record is not printed. The original papers and the copies of the typewritten transcript of the evidence just as it was taken are supplied to each of the judges on a court of appeal. (See Mr. Justice Riddell's account in the "American Bar Association Journal," October, 1919.)

In the English courts for many years most cases have gone up on copies of the judges' notes or of the stenographic record, without printing, although printing appears to have been rather common in recent years, and, in important cases, the record has often been printed because counsel believe it easier for the court to grasp a case.

It has been suggested to the Commission that it would be better in the long run, and would present a case to the appellate court more clearly as it was actually tried below, if, in a case in which much of the evidence was to be carried up, typewritten copies of the evidence exactly as it was taken should be submitted to the full bench without printing. While this would be convenient for the lawyers and the parties, it is doubtful whether it would result in any material reduction of the expense, because, considering the cost of getting a sufficient number of typewritten copies of the whole evidence for each member of the court, as well as copies for the parties, the difference in the expense would hardly be worth the change. The principal advantage of the change, if any, would be to eliminate much of the time required in the preparation of the case under the present rule, and, so far as it is possible, to give a photographic account of the trial. So far as the appellate court itself is concerned, it is obvious that the reading of a printed record in a case of any size is less of a strain on the eyes and nervous force of the judges, and it is undoubtedly easier for them to grasp the case from a printed record than it would be in typewritten form.

But after taking everything into consideration, we are inclined to think it will be better and probably more economical to retain our present method if we can avoid the evils that now attend it. The real difficulty in applying the present rule arises in cases where the excepting party does not make use of the stenographic record in drafting his bill of exceptions, but

attempts to state from his notes or recollection, or both, what he understands the evidence to be. Such a statement is naturally, though often quite unconsciously, partisan and inaccurate. As a result time is wasted, and unnecessary expense is occasioned in the revision of a bill of exceptions so drafted, and in hearings before the court thereon. At such hearings it is not unusual for the court to direct that the bill be redrafted along the lines hereinafter set out. Now the party prevailing in the trial court is entitled to have the exceptions promptly heard, and the bill therefor so prepared that it may be easily corrected, and that without undue expense. Many lawyers avoid this difficulty by taking the stenographic record of the case, and reducing the questions and answers in the order there found to "narrative form," omitting only whatever the parties agree is immaterial to the question at issue. When a bill of exceptions is thus prepared, it is comparatively simple for the opposing counsel to compare the bill with the record, insert anything omitted which is deemed material, and, if there is a difference of opinion as to the meaning of some particular question and answer, they can be substituted for the narrative. Thus friction and the resulting delay and expense are lessened.

It has been suggested that the foregoing well-considered practice be made compulsory, and that in preparing a bill of exceptions in "narrative form" the excepting party be required (unless the parties agree otherwise) to reduce the questions and answers in the order found in the stenographic minutes of the trial to a "narrative form," omitting therefrom nothing except by agreement of parties and approval of the court. After the bill has been so prepared it may be further simplified, of course, by striking out such portions as the parties and the court deem immaterial. If this rule existed, the excepting party, knowing exactly what he must do to perfect his exceptions, would do it, and it seems reasonable to suppose that the main cause of the present friction, delay and expense would be removed. We therefore recommend that the present rule relative to the preparation of bills of exceptions, etc., be amended along the lines above suggested.

(*g*) *Oral Arguments.*

Oral argument is often important before an appellate court, but many members of the bar feel that the oral argument of a case under the existing system is not as effective or of as much assistance to the court as it ought to be, because the court has not examined the record until the argument begins, so that the court, in order to follow the argument, must get the substance of the case from the lips of counsel, or from hurried examination of the record and of the briefs during the argument. This is one reason why we recommend the provision for law secretaries of the judges, and additional clerical assistance.

We believe that it would add to the interest of the argument, both on the part of the court and the bar, and would also help to bring the intellectual force, both of the judges and of the lawyers before them, to bear on the essential points of a case if the judges were more familiar with the facts and the problems in each case before the argument began. This result cannot be brought about unless the judges are given more assistance of the kind which we suggest. There is a limit to the strength of any judge, and it is in the interest of the public that the judges of its highest court should be placed in a position where, without overtaxing their strength, they should be able to get all of the assistance which oral argument can provide.

At present briefs are often filed on the day of argument or the day before, so that there is no time for a careful examination of a brief by the other side. We advise a change in the rules of court to require briefs to be filed at least a week before argument. The function of a brief is to assist the court with a concise statement of the case sufficient to show in a general way the questions involved, references to the important parts of the record upon which a party relies, and an outline of the legal argument and reference to the authorities upon which it is based. A carefully prepared brief is of great assistance to the court in following the oral argument and in the subsequent consideration of the case. It must not be assumed, however, that the court receives such assistance in every case. Lawyers on one side or the other, or both sides, sometimes either overlook or fail to grasp the real questions involved. In such a case the

court has to do practically all the work of studying the case from the beginning, because of the lack of aid received from counsel.

If briefs were filed at least a week in advance of argument, and the justices of the court were provided with secretaries, as recommended elsewhere, so that they would come to the hearing of the argument with more information about the case than is possible at present, the change would have a bracing effect upon the lawyers who appear before that court. The character of the briefs would probably improve, and the bar would realize that argument before the full bench would be a more active and important discussion than it is apt to be under the present practice, and would make more careful preparation for it.

(*h*) *The Need of an Appropriation for Representation of the Supreme Judicial Court of Massachusetts at the Annual Meeting of the Judicial Section of the American Bar Association.*

The history of this organization is described in the "American Bar Association Journal" for July, 1920, as follows: —

> The judicial section of the American Bar Association was created at the most notable meeting of the association, held in 1913 at Montreal. The organization resulted from the convention of a Conference of American Judges, held under the auspices of the association's committee on uniform judicial procedure. The conference was attended by representations from the courts of last resort of twenty-four of the forty-eight states, and representation from the United States Circuit Courts of Appeals, as well as from the Court of Appeals of the District of Columbia and the Supreme Court of Porto Rico. Among the active participants in the initial conference preceding the permanent organization of the judicial section were many of the most distinguished jurists in our country. The judicial section was, to quote the law of its creation, "established for conference, discussion and interchange of ideas as to the duties and responsibilities of the judiciary."
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> The judicial section is rapidly growing in numbers, activity and usefulness. Obviously its membership is limited to appellate Federal and State judges, but in due course the entire number will be enrolled. The substantial handicap of travel expense is being gradually overcome through State appropriations for that purpose. As we have repeatedly said, such an appropriation is a small premium indeed to pay for insurance against diverse judicial opinions; against Federal usurpation of States' rights in

the effort to avoid conflict; for the promise of uniformity; and for the constant improvement in jurisprudence assured by an annual convention of appellate Federal and State judges.

It is in the interest of Massachusetts that the Supreme Judicial Court should be represented at these annual conferences. The chief justice and some of the other justices have often attended these meetings at their own expense. The meetings are held in different cities of the country, from Maine to California, and there is no reason why the representatives of the court in such matters should be expected to assume the expense of thus representing the Commonwealth.

We recommend an annual appropriation of $500 for this purpose.

2. The Superior Court.

(a) *The Number of Judges.*

There are now a chief justice and twenty-seven other justices of the Superior Court. When that court was created, in 1859, there were ten justices. As the work of the court gradually increased, partly from the growth of litigation and partly from the transfer of jurisdiction from the Supreme Judicial Court, the number of justices was increased, the latest addition being in 1911, when five more justices were provided for, making the present number of twenty-eight.

It has been suggested that there are too many judges on this court. On the other hand, some members of the bar believe that more judges are needed, particularly in order that there may be more opportunities for the hearing of cases on the criminal side of the court, and for the hearing of cases without juries in several of the counties. It is also suggested that many cases now referred to masters and auditors could and should be heard by a judge with less delay and expense.

The Commission has no statistics as to the amount of time spent by the individual judges of the Superior Court in the performance of their work, and it is difficult to express a definite opinion as to the practical possibilities of so arranging the work of the existing judges as to produce more results. We have already recommended that in the future a system of more definite and continuous information should be provided as a

basis for the development of the courts in accordance with a more concerted plan. A judicial council would be in a position to study the relative amount of work, the time required to do it in different parts of the State, and to make suggestions, after conference with the chief justice and others, which might help in the better arrangement and distribution of the judicial power. We believe that such information should be collected, and the possibilities of the existing force of judges be further studied, before any action is taken by the Legislature to increase the number of judges.

We call attention to some of the practical problems illustrating the need of such a detailed study.

Reference is made elsewhere to a demand for more extended criminal sessions in some counties to enable the district attorneys to try their cases. The relation between that demand, and the use made by the district attorneys of such extended opportunities when they are provided by the court, calls for study.

The Need of More Experiments and Study of the Possibilities for Jury-waived Hearings. — The annual cost of a single jury session in Suffolk County for a year was estimated in 1909 by the commission of that year as, "at least $30,000 a year in salaries of judge, clerk, court officers and payment of jurors, leaving incidental expenses out of account." With the current high cost of everything the expense of a jury session is, of course, considerably greater than it was ten years ago. The relative cost as compared with the cost of a trial without jury is greater by the cost of the jury and its incidental expense.

The right to a jury trial has always been one of the fundamental constitutional rights in America, and it has been carefully protected in Massachusetts. But in view of the inevitable delay and expense, as well as the uncertainties involved, the desire to exercise this right is not as general as it used to be. More than forty years ago the special commission of 1876, already referred to, said in its report (page 6): —

> There is a widespread and growing opinion that trial by jury, in a large proportion of civil cases at least, is a clumsy and unsatisfactory process for settling the rights of parties; . . . it is important that the courts be so constituted that litigants may obtain, in the largest number of cases practicable, satisfactory decisions without resorting to the jury.

The commission of 1909, of which the Hon. Robert M. Morse was chairman, expressed the following deliberate and inclusive statement of their practical judgment: —

> In the Land Court, as in the probate courts and in police, district and municipal courts and before trial justices, the right of trial by jury is little valued or desired by a party until a decision adverse to him has been made.

These opinions have been justified by the facts since they were expressed, and the most striking recognition of it by the Massachusetts Legislature has been the passage of the Workmen's Compensation Act and such acts as that of 1912 relating to the Municipal Court of the City of Boston, which does not prevent a trial by jury if it is really desired, but restricts the opportunities for abusing the right at the expense of the public and the litigants merely for the purpose of delay. This does not mean that obstructions should be placed in the way of exercising the right when it is desired for a legitimate purpose, as is done in some States where a jury fee is required. But the advice of the Commission of 1876 should be followed by providing opportunities so that those who are satisfied with a trial before a judge without jury may have it and be encouraged to ask for it.

Under the present requirement of sittings and their varied duration in different counties, the Commission is informed by various members of the bar that it is common for counsel, who do not care to have a jury trial, and who would be satisfied with a hearing before a judge if they could be sure of a prompt hearing and full consideration of the case, to mark cases for jury trial because, in view of the practical results of the present arrangements for the disposition of criminal cases, divorce, naturalization, etc., the time left for the hearing of other civil cases without a jury is so short and uncertain that their cases, if marked for hearing without a jury, are likely either not to be reached, or to be referred to an auditor, with resulting delay and expense. On the other hand, in some counties much of the time of a jury-waived session is lost because the lawyers are not ready to try their cases. One judge writes as follows: —

> The creation of more jury-waived sessions will not solve the difficulties. . . . The judges do not get enough work now to keep the present jury-

waived sessions in the outlying counties busy. Counsel are not ready to try when there is a session. Undoubtedly if they could have a judge sent out to try whenever they desired, it would save reference to masters and auditors. About two years ago I went to Dedham for a week of jury-waived work. In no day during the week did I have two hours' work, and I did not leave Dedham until waiting to see whether any one would come upon a later train. I also had the clerk telephone to counsel having cases on the list that there was abundant time to get a trial without any delay. In less than two months thereafter a member of the Norfolk bar came to me with a complaint that they did not have enough time for their jury-waived work.

Another suggestion is that in some counties business men who would like to have a hearing of their cases before a judge, and who do not wish for a jury trial of some business question, refrain from bringing their cases into court at all, and resort to arbitration. This is not as satisfactory to them as a decision by a court would be, and so they feel that the Commonwealth does not provide them with a sufficient opportunity for a judicial hearing. To what extent this feeling exists it is impossible to say. In so far as it does exist, it is, of course, unfortunate.

In view of such considerations and the information presented to the Commission, the fact that the amount of litigation is likely to increase again since the ending of the war, and the additional services suggested in this report, we do not feel that the present number of the Superior Court should be altered, but we do feel, as explained throughout this report, that changes should be made so that more results may be obtained by the community from the existing force of judges.

(*b*) *Masters and Auditors.*

Much complaint and criticism have come to the Commission in regard to the practical working of the system of masters and auditors. Some of the discussion, before members of the Commission on this subject, which took place in Worcester in December, 1919, may be found in the "Massachusetts Law Quarterly" for February, 1920.

Masters are appointed to hear the facts and report their findings to the court in equity cases. They are not regular officials, but are members of the bar appointed by order of court to hear particular cases, or such parts of them as the

court sees fit to refer to them. Their original function was to hear only parts of complicated cases involving accounts requiring extended examination of books and other documents which, because of the time required for such examination, it was not feasible for the court to hear without unreasonably delaying the business of other litigants. In practice, owing to increase of business, the appointment of masters in equity cases has become common in many cases which might more properly be heard by the court itself. The hearing of a case before a master takes much longer than before a court. There are cases, of course, in which, because of the peculiarities of the facts or the number of books and documents to be examined, hearings should not be hurried, but there is unquestionably too much delay in many cases which are so referred, and the expense falls upon the parties. After hearing by a master, his findings of fact are the basis of subsequent action of the court. The court does not hear additional evidence, but applies the law to the facts reported by him with such inferences from his findings as the report warrants. While the court has the power so to refer a case that the master is expected not only to report the facts but also to rule on questions of law, it is not usual so to refer questions of law.

In the same way auditors are not permanent officials, but are members of the bar appointed by the court in particular cases to hear the evidence and to report their findings of fact. References to auditors are made only in cases at law, whether a jury is claimed or not, usually when an accounting is necessary. Where the evidence is not reported a master's findings of fact are conclusive unless the case is recommitted to the master to hear further evidence or make further findings of fact. An auditor's report, on the other hand, is merely prima facie evidence in favor of one party or the other, and after it is filed the case may be tried over again, the report being considered only as part of the evidence. Accordingly, there is sometimes a second trial of the facts, unless the parties are satisfied to settle the case upon the basis of the auditor's report. Auditor's hearings are also the subject of complaint because of delay and additional expense, and it is a common feeling that there are too many cases so referred.

The compensation of masters and auditors is fixed by the court and paid by the county in which the reference is made. The regular rate of compensation thus paid by the county now is $25 a day. In many cases of importance, however, in which parties on each side agree upon a master or auditor because they have special confidence in his capacity and judgment, they agree to share the expense of providing additional compensation in order to secure the services of one who is not willing to sit at the usual rate. Often, also, a stenographic record is taken of the evidence, the expense of which is paid by the parties, or one of them. This may be a serious matter, in view of the fact that the case is sometimes tried over again. A master or an auditor is often expected to hear much evidence which may not be material after the decision of some question of law. All this increases the expense and delay in such cases.

It should not be supposed, however, that all references to masters and auditors are either unnecessary or undesirable. Many cases can be tried to the greater satisfaction of the parties under such a reference, so that it is not advisable that all such references should cease, but they should be reduced in number, and more cases should be heard directly by the court. Not infrequently cases are so referred which appear, from the pleadings, to involve a long series of items, when in fact but few items are in dispute. On the other hand, most of the criticism of such references has been based upon the imperfections, with comparative disregard of the advantages of the system. These advantages, however, must be kept in mind in considering new steps. The experiment tried recently by one judge in Boston, of having several masters on hand in the court house ready to proceed forthwith in cases referred to them, is said to have resulted in despatching business promptly. It is the judgment of experienced clerks of court that references to masters and auditors save a great deal of time and expense. Often the report disposes of the case without further proceedings of importance, and in those cases in which there is a retrial before a jury an auditor's report saves much time. The experience of clerks in different counties varies in regard to this matter. In one of the smaller counties it is estimated that

only 1 case in 25 of those referred to an auditor goes to trial before the court or a jury after the auditor's report.

The clerk of the Superior Court for the county of Suffolk informs us that his records from January, 1914, to November, 1920, show the following facts: —

1. Number of cases referred to auditors,	879
2. Those that have been retried after hearing before auditor: —	
(*a*) Before a jury,	100
(*b*) Before the court,	50
3. The number of cases that have been settled or otherwise disposed of as a result of the auditor's decision cannot be estimated with certainty, but it is probable that cases which have been discontinued after reports, nonsuited, or defaulted, or agreement of neither party entered, or dismissed after report, or agreement for judgment entered, have resulted from the auditor's hearing. Also agreements for judgment and neither party which were entered before auditor's report was filed. It may therefore be inferred that the following have been disposed of as a result of the reference to an auditor: —	
Plaintiff's discontinuance after report,	2
Nonsuited after report,	6
Defaulted after report,	13
Agreement for neither party,	55
Agreement for judgment and neither party (in these cases auditor's report was filed after agreement),	92
Dismissed after report,	11
Agreement for judgment after report,	283
Total,	462
4. Judgment on reports,	75
Cases still pending after report was filed,	192

In regard to the masters' reports. . . . As a practical matter it seldom happens that the masters' report is modified or otherwise affected by the hearing on exceptions, and it is doubtless the fact that counsel realize this and settle many cases on the basis of the report without further hearing.

Number of cases referred to masters from Jan. 1, 1914, to November, 1920,	801
The number of cases in which exceptions were taken on specific objections were,	217

Thus out of 801 cases referred, exceptions were taken in about 27 per cent.

In considering such figures from the records, however, it is impossible to say what proportion of the cases thus disposed of came to an end because the patience or the pocketbooks of the parties were exhausted by delays.

It has been suggested with much force that the trouble with the present system of masters and auditors arises from the fact that practice has gradually grown away from their original function, which was to hear the evidence and to make findings on parts of a case involving accounts or other matters which required detailed and prolonged examination. Under the present practice of referring the whole case it gets too far away from the control of the court. The progress of the case escapes the supervision of the court, and important issues on which the parties prefer and expect a hearing and decision by the court are heard and decided by the master or auditor. As already pointed out, also, under the practice by which a master is expected to hear evidence and find facts on alternative theories of the law, much time is taken up which might be avoided by a definite ruling of the court.

While there are some cases of so complicated a character, and the hearing of which necessarily occupies so much time that the necessities of the courts in arranging their work, as well as the interests of the parties, are better served if the whole case is referred to a master, we believe the general policy of keeping the court in closer touch with the case to be sound, and that as far as practically possible, particularly in cases in equity, the court should hear and decide the main issues in the case if they can be separated from the taking of accounts and other matters of that character, the necessity for taking which depends upon the main issue. For instance, in a case containing allegations of fraud, the question of fraud, if it is not too involved, might be heard and decided by the court, if possible, and then, if the taking of an account is necessary after such decision, the taking of it should be referred to a master.

The court might well consider some method of requiring periodical reports from masters or auditors of their action and the progress of the case. We believe that such practice would keep the court more closely in touch with the proceedings. We see no better method of overcoming the present easy-going

practice, under which the convenience and agreements of counsel control the progress of the case to such an extent that a master or auditor is practically helpless.

We also suggest that the practice of hearing extended evidence upon alternative theories, much of which may be immaterial if certain rulings of law are made, may be corrected with considerable saving if such questions of law are reported by the master or auditor for the ruling of the court more frequently than under the present practice. This does not mean that the master or auditor should avoid making rulings necessarily incident to a case before him, but that he should use his discretion in the matter, so that, if the taking of much evidence depends upon a ruling of a question of law, as to which there is serious doubt, that question should be formulated and reported to the court for a decision, for the guidance of the master or auditor. If such practice should show an unnecessary number of applications to the court, it could be readily controlled by the court. Of course the court may find it wiser not to rule on the question of law until all the evidence is in.

These suggestions as to practice do not call for legislation, but are simply illustrations of practical methods, by which we believe improvements may be brought about.

In a later part of this report we make recommendations to provide for the preliminary oral examination of parties in order that there may be better opportunity for ascertaining the real issues in controversy in advance of trial. If these recommendations are adopted, we further recommend that the court should develop the practice of referring cases to masters or auditors only after it is satisfied, as a result of such examination, or otherwise, that a reference is really necessary, and, if so, on what issues. The decision whether such a reference shall be made must, of course, be left to the judgment of the court.

The question also has been raised whether more judges should not be added to the Superior Court to do some of the work now referred to masters and auditors. A statement of the cost to the counties for masters, auditors and referees over a period of years as reported to us by different county treasurers is given on the following page. This table does not include figures from Dukes County, as no figures were received from that county.

TABLE SHOWING THE NUMBER OF CASES AND THE AMOUNTS PAID TO BY COUNTY TREASURERS AND THE

[The totals are not given before 1914, as the information

	1910.		1911.		1912.		1913.	
	Cases.	Amount Paid.	Cases.	Amount Paid.	Cases.	Amount Paid.	Cases.	Amount Paid.
Barnstable County.								
Total amount paid masters and auditors.	–	–	–	–	–	–	–	–
Bristol County.								
Auditors,	8	$565 00	11	$1,001 96	10	$643 70	12	$1,255 31
Masters,	8	578 75	8	690 64	6	416 91	13	1,418 08
Berkshire County.								
Auditors,	9	785 00	10	789 75	5	296 50	5	478 75
Masters,	5	535 25	3	423 40	8	670 05	4	170 63
Investigators,	4	89 40	1	65 70	–	–	4	236 38
Arbitrators,	–	–	4	136 00	–	–	–	–
Referees,	–	–	–	–	1	30 00	1	37 50
Assessors,	–	–	–	–	–	–	1	15 00
Commissioners,	–	–	–	–	–	–	1	225 25
Essex County.								
Masters, auditors and referees.	28	5,359 16	36	3,558 85	45	5,787 06	35	4,183 00
Franklin County.								
Auditors,	1	48 25	5	290 00	3	240 00	3	429 50
Masters,	4	191 00	5	401 69	5	197 50	4	157 50
Hampden County.								
Auditors and masters,	–	952 75	–	2,574 42	–	2,619 50	–	3,052 45
Hampshire County.								
Auditors,	5	390 00	2	311 00	2	72 50	3	255 00
Masters,	4	397 50	4	493 75	3	235 28	3	487 50
Middlesex County.								
Auditors,	–	4,099 07	–	5,042 91	–	4,337 04	–	6,980 60
Masters,	–	3,119 11	–	2,191 00	–	4,130 64	–	5,997 18
Norfolk County.								
Auditors,	–	–	–	–	12	1,528 75	8	1,181 65
Masters,	–	–	–	–	7	1,428 55	11	1,169 38
Auditor and master,	–	–	–	–	–	–	–	–
Investigators,	–	–	–	–	–	–	2	215 75
Commissioners,	–	–	–	–	–	–	–	–
Plymouth County.								
Auditors, masters, referees and investigators.	–	680 37	–	839 98	–	1,110 00	–	1,050 50
Suffolk County.								
Auditors,	113	12,073 39	95	10,676 66	120	13,496 09	115	15,112 90
Masters,	122	22,880 21	129	27,981 64	141	22,848 79	149	24,872 53
Worcester County.								
Auditors and masters,	20	4,055 94	29	3,334 20	33	4,360 90	46	5,442 80
Nantucket County.								
Auditors,	–	–	–	–	–	–	–	–
Masters,	–	–	–	–	–	–	–	–
	–	–	–	–	–	–	–	–

MASTERS AND AUDITORS, ETC., COMPILED FROM INFORMATION FURNISHED AUDITOR OF THE CITY OF BOSTON.

from some of the counties did not go back of that year.]

1914.		1915.		1916.		1917.		1918.		1919.	
Cases.	Amount Paid.	Cases.	Amount Paid.	Cases.	Amount Paid.	Cases.	Amount Paid.	Cases.	Amount Paid.	Cases.	Amount Paid.
{ 17	$1,852 70	12	$663 86	{ –	$2,041 96	–	$619 89	–	$708 45	–	$514 59
{ 20	1,176 85	11	1,429 01	{ 12	871 25	9	395 00	8	694 99	9	688 33
				{ 25	2,122 39	14	702 20	15	1,116 41	11	1,189 99
–	–	–	–	–	–	–	–	–	–	–	–
–	–	–	–	–	–	–	–	–	–	–	–
5	208 40	19	1,198 63	15	932 87	12	544 38	6	500 80	6	771 03
4	421 20	9	646 25	3	405 00	7	642 50	4	412 81	10	998 29
–	–	1	25 00	1	50 00	–	–	–	–	3	71 67
–	–	–	–	–	–	1	5,057 04	1	105 25	1	50 00
–	–	–	–	2	75 00	–	–	–	–	–	–
–	–	–	–	–	–	–	–	–	–	–	–
–	–	1	40 00	1	60 00	–	–	–	–	–	–
43	4,639 53	46	6,292 40	36	5,298 42	42	6,252 27	49	9,937 96	40	7,995 96
8	990 00	4	810 00	1	82 77	4	450 20	2	191 55	2	107 26
4	280 00	6	262 50	4	156 25	5	165 00	4	113 37	2	241 64
–	1,765 62	–	6,683 95	–	4,256 47	–	5,002 80	–	4,934 19	{ 22	1,869 40[1]
										{ 24	2,332 90[2]
1	396 85	4	317 50	2	505 70	1	30 00	9	405 83	6	400 00
6	449 65	1	125 00	1	420 00	2	470 00	2	55 00	7	971 66
–	8,026 76	–	8,231 31	–	6,690 69	–	5,803 71	–	7,198 43	–	7,272 14
–	7,647 06	–	3,424 54	–	5,932 68	–	3,577 20	–	9,131 64	–	3,801 27
13	1,735 00	9	862 50	6	1,993 70	6	720 18	9	1,729 67	5	601 25
3	220 00	13	2,388 12	5	1,242 50	15	2,119 25	10	2,278 40	8	2,977 90
–	–	–	–	–	–	1	375 00	–	–	–	–
1	25 00	–	–	2	125 00	1	182 50	–	–	–	–
–	–	–	–	–	–	2	296 67	3	678 15	–	–
–	674 00	–	1,978 59	–	1,948 52	–	932 50	–	3,313 38	–	2,652 50
139	18,832 06	139	17,328 09	149	21,237 36	142	22,026 88	113	22,678 98	108	19,492 71
119	16,653 04	176	27,942 65	162	26,530 46	126	20,631 63	139	34,059 26	136	31,278 19
32	4,107 05	30	3,18 01	41	3,427 01	36	5,197 10	30	4,842 71	37	6,803 47
–	–	2	1,093 00	1	157 55	2	220 00	1	160 10	–	–
–	–	–	–	2	161 60	–	–	–	–	–	–
415	$70,100 77	482	$84,930 91	471	$86,725 15	428	$82,413 90	405	$105,247 33	437	$92,082 15

[1] Auditors. [2] Masters.

Chapter 60 of the Resolves of 1920, however, shows an appropriation of only $300 for "auditors, masters and referees," so that the figures from Dukes County would not materially alter the figures shown in the table. The estimates for auditors, masters, etc., for 1920 in the counties other than Suffolk and Nantucket, as shown by Resolves of 1920, chapters 57 to 68, amounted to $65,200. It may be that this amount has not all been needed during the past year, but these appropriations, taken in connection with the figures given in the table, show that in Suffolk County alone the cost of such references now amounts to about $50,000 a year, and the total cost to all the counties amounts to approximately $100,000 a year. While, as already pointed out, it does not seem desirable to do away with the system of special references, yet the amount of money now spent by the various counties for masters and auditors would cover the compensation of at least five additional Superior Court judges at the present rate of compensation, and still leave about $50,000 to cover necessary references.

The natural desire of members of the bar in some of these counties for more frequent opportunities to get at a judge does not seem unreasonable. The Commission has already recommended the removal or raising of jurisdictional limits of the district courts in civil cases, in order to offer more opportunities for trials without juries. We are also inclined to believe that the assignment by the chief justice of the Superior Court of a judge to sit in continuous circuit for all matters without juries throughout the year in Springfield, Pittsfield, Greenfield and Northampton would be a wise experiment. If it developed that his time was not fully occupied with the work of such a circuit he could be assigned for duty elsewhere in the Commonwealth, but such a judge might be in a position to try out some plan of preliminary examination to define issues, because he would be on hand to do so. In the same way, perhaps the assignment of a judge for similar purposes to sit in the counties of Bristol, Plymouth, Barnstable, Norfolk and Worcester would be advisable. There is probably a similar need for more frequent sittings in parts of Essex County, and perhaps in Lowell in Middlesex County.

We are clearly of the opinion, however, as stated at the beginning of this discussion, that the number of judges should not

be increased until more detailed information than we have now is collected and studied.

It may be found, if our suggestions should be adopted, that the chief justice of the Superior Court will need the assistance of a secretary. That can best be determined in the future.

(c) *The Right of the Jury to the Assistance of the Court in Regard to the Facts and Evidence.*

The relations of judge and jury are generally talked about in terms of the powers of the judge.

Sixty years ago a statute was passed, without much public discussion, which has seriously interfered with the administration of justice ever since, and as a result of which a prejudice has developed about the relations of judges and juries similar to that which prevented the growth of equitable remedies in the interest of justice for so many years. Ever since 1860 there has been a statute which has prevented juries from receiving the assistance from the court which they should receive and do receive on proper occasions to-day in the United States courts.

In the discussion of this statute from time to time the rights of the jurymen and of the people of the State to have the judge free to perform his proper functions as a duty to the State and the jury, as well as to the litigants, have been overlooked. Chief Justice Parker said, in 1830: —

> We know of no rule requiring the judge to conceal his opinion. He is to comment upon the evidence. Is he to do it, merely stating that one witness says this thing and another witness says that? Has he not power to say this evidence is weak and that evidence is strong?

The story of the change in the State practice appears to be as follows: —

The commissioners of 1858 on the consolidation of the statutes made their report to the Legislature of 1859, and, as usual, a joint committee of the Legislature was appointed to consider the report. This committee reported to the special session of 1859 many amendments of the commissioners' report, and, in the act relating to the courts, added the following new short section: —

> The courts shall not charge juries with respect to matters of fact, but they may state the testimony and the law.

It does not appear to have been suggested by the commissioners or by any of the printed reports of subcommittees, but it appears in the general report of the committee. There does not seem to have been much general discussion of it, and it was adopted along with the consolidated mass of law in the General Statutes as section 5 of chapter 115, and has remained ever since. It now appears as section 81 of chapter 231 of the General Laws.

In the "Preliminary Treatise on Evidence at the Common Law," in the chapter on "Law and Fact in Jury Trials," at page 188, the late James B. Thayer said: —

> It is not too much to say of any period, in all English history, that it is impossible to conceive of trial by jury as existing there in a form which would withhold from the jury the assistance of the court in dealing with the facts. Trial by jury, in such a form as that, is not trial by jury in any historic sense of the words. It is not the venerated institution which attracted the praise of Blackstone and of our ancestors, but something novel, modern and much less to be respected.
>
> In the Federal courts the common-law doctrine on this subject has always held. "In the courts of the United States, as in those of England, from which our practice was derived, the judge, in submitting a case to the jury, may, at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment on the evidence, call their attention to parts of it which he thinks important, and express his opinion upon the facts. . . . The power of the courts of the United States in this respect is not controlled by the statutes of the State forbidding judges to express any opinion upon the facts." (Gray, J., for the court, in Vicksburg, etc., R.R. Co. *v.* Putnam, 118 U. S. 545, 553 (1886). And so McLanahan *v.* Ins. Co., 1 Pet. 170, 182 (1828), and Simmons *v.* U. S. 142 U. S. 148, 155 (1891).) In U. S. *v.* Phil. & Reading R.R. Co., 123 U. S. 113, 114 (1887), the court said: "Trial by jury in the courts of the United States is a trial presided over by a judge with authority, not only to rule upon objections to evidence, and to instruct the jury upon the law, but also, when in his judgment the due administration of justice requires it, to aid by explaining and commenting upon the testimony, and even giving them his opinion upon questions of fact, provided only he submits those questions to their determination."

Almost identical language was again used by the court in Capitol Traction Co. *v.* Hof, 174 U. S. 1, at p. 13, 14.

Aside from any constitutional question, what is the practical policy expressed in the statute above mentioned considering the public interest in getting full value for the people. This statute

says that the only impartial trained mind in the court room, placed there at public expense to assist the jury in doing justice, shall be silent in regard to many of the most important questions to be considered. When men are to serve on juries at a serious sacrifice of time, and perhaps loss of business, the State is bound to provide the jurymen with such intelligent assistance as is possible under the circumstances. That is what the judge is provided for. The judge has not only the power, but it is his duty, to set aside the verdict of a jury if it is against the evidence or clearly against the weight of the evidence. That is part of the constitutional function of the courts. If the judge sets a verdict aside a new trial results for which the public pays the expense. The judge may also direct a verdict for one side or the other without submitting the case if he considers as a matter of law that the evidence would not warrant a different verdict. Such action by the court is, of course, subject to exceptions which may be carried before the Supreme Judicial Court, and, if that court considers that the judge was mistaken, the case goes back to be retried at the expense of the public.

The constitutional duty of the judge to weigh the evidence and the incidental powers to direct or set aside verdicts are clear and beyond the power of the Legislature. In the opinion of the justices (207 Mass. 606, at p. 609) they say: —

> We deem it the established law of this Commonwealth that the right of each party to have the assistance and protection of the presiding judge, including the power on the part of the judge to set aside the verdict for good cause, is a part of his right to a trial by jury, secured to him by the Constitution of the Commonwealth. A similar right is secured to litigations in the United States courts by the Federal Constitution. This right continues until a verdict is returned to which no valid objection is made, and which therefore settles the rights of the parties as to all matters included in it. It follows that the Legislature has no authority to enact a statute which limits or impairs this right.

But most cases, which take up the greater part of the time of jury trials and cause the main expense to the public, are submitted to the jury either because they ought to be or because the judge thinks that it is wiser to do so. Although in these cases the judge may set aside a verdict after it is rendered, and justice may demand that he should do so, even at

the expense to the public of a new trial, yet this statute says that he must not open his mouth before the verdict, about the facts of the case as they appear to him, apparently for fear that the jury will not do their duty of thinking for themselves. Does that statute really reflect the judgment of the people of Massachusetts as to their own character and intelligence when they are called to serve on juries? Do they really consider themselves so incompetent that they cannot listen intelligently and carefully to the opinion of the only legally trained mind in the court room that is expected to be impartial, and then weigh what the judge says, "size up" the judge and make up their own minds without being afraid of him or his opinion on the facts? We believe that they can listen to a judge intelligently and respectfully without being awed by his mind or his position. Otherwise, why are expert opinion and advice sought in every other branch of public service and in all private business outside of a court before, rather than after, decisions are made? The citizens of Massachusetts before 1860 expected to have the assistance of the judge when they sat on a jury, and they were not in the habit of yielding their opinions meekly either in or out of court.

In Mitchell *v.* Harmony, 13 Howard 420, the chief justice of the United States, in referring to the practice in the Federal courts said: —

> Nor can it be objected to upon the ground that the reasoning and opinion of the court upon the evidence may have an undue and improper influence on the minds and judgment of the jury, for an objection of that kind questions their intelligence and independence; questions which cannot be brought into doubt without taking from that tribunal the confidence and respect which so justly belong to it in questions of fact.

That is the kind of jury trial that the jurymen themselves, who have to pay with their time and the interruption of their business, and the public, which has to pay the expense of all jury trials, are entitled to have in the courts of the Commonwealth under our Constitution, in the interest of the more careful, prompt and fair administration of justice.

We are confident that this aspect of the matter will appeal to the business judgment of the community.

The jury system does not exist for the purpose of allowing lawyers on one side or the other to control the case more than the judge, whether by skill, force of personality or otherwise. The people are represented at the trial by the judge as well as by the jury. Of course it is the business of the judge to explain to the jury that anything which he may say about the facts and the character of the evidence is merely for their assistance for what it is worth, and is not to control their judgment in deciding the questions of fact, and the judge must explain this. It is also true that judges will differ in their capacity to grasp the facts and the evidence and state their conclusions clearly and fairly in such a way as to help the jury, but Massachusetts citizens who are accustomed to "size up" other men in their private affairs are quite as competent to "size up" a judge in this respect, and to realize that, while they are to take the law as he gives it to them, they are not required to agree with him about the facts and the evidence.

We recommend the repeal of section 81 of chapter 231 of the General Laws.

3. The Probate Courts.

Since the passage of chapter 274 of the General Acts of 1919, relative to appeals, there seems to be no occasion for a general discussion of practice in these courts. Certain questions dealing with their relations to other courts are discussed elsewhere. We do, however, recommend, for manifest reasons, an act with reference to appeals in cases of guardianship, a draft of which is submitted in the Appendix.

As stated in the report of the Supervisor of Administration for 1919 (at page 10): —

> The suggestion has been made that the probate courts should be made circuit courts, and that the judges should receive the same salary. This suggestion has met with considerable criticism on the ground that judges of probate should be as well acquainted with the parties appearing before them as possible.

There is a great deal of force in this criticism, except in Suffolk County and perhaps Middlesex, for in other counties the judge of probate has, for a century or two, been, not only a

judge, but a sort of general friend and adviser to the people of his county. While there are disadvantages in this relation they are probably outweighed by the advantages to the different communities, and we believe this view represents the general opinion.

Appraisements.

General Laws, chapter 195, section 6, requires that the property in the estate of every deceased person shall be appraised, and ordinarily this is done by three appraisers, although the probate court has discretion to appoint only one appraiser. Property is usually appraised upon the appointment of trustees or other fiduciaries, but the court may dispense with an appraisement. These requirements were adopted by the Legislature before the practice of an official appraisement for taxation purposes developed, and when there was less information in regard to values easily available.

But since the development of the State and Federal practice in appraising property for taxation purposes, and the multitude of papers and necessary red tape in which the settlement of an estate is now involved, and since the value of property is in most cases readily ascertainable, this requirement for an additional appraisement has become not only unnecessary, but, to a very considerable extent, a perfunctory performance, causes unnecessary expense, and adds to the already excessive burden connected with the settlement of an estate. The valuations reported by these statutory appraisers are not accepted either by the State or Federal officials without further investigation of their own. The fiduciary for his own information must ascertain values for the purpose of his inventory, and his statement of values subject to correction by the State authorities is all that is ordinarily necessary in this respect.

Accordingly, we recommend that the law be changed so that an appraiser need not be appointed unless the court considers it advisable for some special reason, and we submit draft of legislation in Appendix A.

IV. OTHER RECOMMENDATIONS AS TO PROCEDURE AND PRACTICE.

1. The Administration of the Criminal Law.

There is a common impression that district attorneys, particularly in the larger counties, have gradually been placed in a position in the administration of the criminal law which their office was not designed to hold. The accumulation of cases owing to the existing system of appeals from the district courts, and the lack of sufficient criminal sessions at which to try cases in the Superior Court, results in the fact that the constant appeals from the decision and sentence of the district courts, though taken in theory to the Superior Court, come really to the district attorney, who disposes of many cases by negotiation with the counsel for the defendant. The practical situation is clearly described in the following communications to the Commission, one from a district attorney and the other from a former assistant district attorney who had had large experience in criminal cases.

The district attorney writes in regard to his own district: —

> The present number of terms [was] provided for several years ago, since which time criminal business of the county has increased tremendously, approximately 300 per cent. In 1919 two or three special sittings have been had, but even then entirely inadequate to help out the situation. At the beginning of each regular sitting we have approximately 500 cases. Jury sittings are of three weeks' duration, fifteen days in all. We cannot try over one case every day on an average. This means that substantially 485 must be disposed of in some manner other than trial. This of necessity means filing as disposition, and unwarranted leniency in many cases, a situation we are practically forced into. The pressure of business is so great that cases cannot be as fully examined by either the district attorney or the court as is desirable.
>
> At present long gaps between March and June and September sittings mean big volume of grand jury work in June and September. Decision in the case of Commonwealth *v.* Harris, requiring separate examination of witnesses, makes the work extremely cumbersome. Tremendous increase in automobile cases, transfer of bastardy cases to criminal court, extradition in nonsupport cases, and cases coming to us through newly created statutes, such as Fire Prevention Bureau, etc., has given criminal courts a large amount of new work. Monthly sessions should be had . . . with the exception of July and August.

A criminal division of the judges of the Superior Court should be instituted in order to bring about uniformity in matters of sentences and procedure. Sentences imposed upon different defendants convicted of the same offence under similar circumstances, involving great differences in length of time of sentence, bring about disrespect for law and belief in lack of justice of courts. The depriving of men of liberty should be dealt with only by judges who by training, experience and temperament are best qualified for the work.

There should be a judge on call in Boston for criminal work at all times. We are unable . . . to take care of criminal business at the regular sittings of the criminal court. We are obliged, therefore, to go into the civil session almost daily for the disposition of cases and arraignment of offenders. A judge in Boston, in reserve for the call of the various counties, could be of effective use, . . .

The former assistant district attorney writes: —

. . . I cannot too strongly inveigh against the present state of affairs in the administration of the criminal law. . . . The tremendous pressure of business does make it impossible to handle cases as they should be handled. The government is practically at the mercy of such defendants as are represented by counsel, who know very well that if they advise their clients to insist on a plea of not guilty and a trial they can clog the meager term of court to the point where the district attorney will himself cry for mercy. That the district attorney may take them at their word now and then, and make them try or plead, is so much of an uncertainty that it fails to daunt them.

Consequently the district attorney and his assistants call in police officers and government witnesses and get their stories. Then defendants' counsel are heard, and then, unless a trial is absolutely unescapable, a crime is disposed of by agreement between counsel, and the judge is asked to rubber-stamp the agreement with his O. K. If there is the slightest doubt that he will do so the case goes off the list to await the time when a judge will be presiding who is not likely to be so independent. This course is not strictly defensible, but it gets its modicum of excuse from the desire that an agreement made by attorneys be carried out, — an idea that has some force, although such agreements are always made with an expressed or implied condition that they are subject to the sanction of the court. The judge has, of course, the power to upset any agreed disposition that comes before him, and to make his own full and independent investigation into the case and to use his own judgment, but if he does so he uses up much precious time and embarrasses the district attorney exceedingly. Any judge who has had experience with the administration of the criminal law is likely to follow unhesitatingly the recommendations of a district attorney whose judgment he trusts, but he is put in an embarrassing position if things have happened which shake

his confidence in the district attorney, and I doubt if in any case a judge feels any satisfaction in taking the responsibility for the product of the judgment of somebody else. It must irk to be a rubber-stamp.

While a district attorney is by force of his powers and duties invested with a certain amount of quasi-judicial discretion, I cannot believe that he was ever intended to have or that he ought to have judicial powers beyond his power to nol pros, and yet, in the practical working out of the present situation, he does, in effect, exercise the power of the judge without having the judge's responsibility.

Another bad feature of the situation is that in the process of trading between the district attorney and the defendants' counsel the district attorney too frequently has to barter a part or the whole of a well-merited sentence imposed by the lower court. In spite of the fact that now and then the sentence of the lower court reveals the knowledge of the lower court judge that his disposition of the case will be made the subject of barter in the Superior Court, I believe that the great majority of lower court judges in . . . County disregard that knowledge and are utterly conscientious in trying to deal with each case on its own merits. My own judgment, formed after careful examination in many cases, has convinced me of this, and that their sentences were just. . . . A lower court judge may well feel that his careful work on a case is no more than a sigh in a gale.

In a large majority of appeal cases defendants have counsel. A bunch of ten gamesters are fined $10 each in the lower court. Five have no lawyers and pay their fines and thereby get criminal records. The other five have lawyers upon whose advice an appeal is taken. Then the district attorney is given an option to try the gamesters before a jury, or to take pleas of nolo and put the cases on file, the defendants escaping a criminal record. As against this trivial matter there are cases of rape, robbery, burglary, aggravated assaults and other serious crimes which must be tried. With a limited opportunity for trial, still further limited by the time that must be given to jail delivery, the district attorney takes the serious cases to try and contents himself with the offered disposition of the gaming cases. Then the young gamesters go back to their dice, rail at their five companions who now are marked with criminal records, and thumb their noses at the chagrined police. Whatever is responsible for this possibility ought to be speedily remedied.

I did not set out to prove what is admitted, but I could not restrain my expression of disgust with the situation that exists.

It seems clear that such a situation ought not to exist. What is the remedy? The writer of the letter last above quoted continued as follows: —

The formation of a criminal division of the Superior Court deserves consideration, but is secondarily important. The chief thing is the pro-

viding of facilities for handling the criminal business in an adequate way. Those facilities do not now exist. If district attorneys could say to defendants' counsel, "plead or try," and could make good their position, I am convinced that the present large number of appeals would be very materially reduced, especially if the Superior Court judges, in imposing sentence, would consider that an unwarranted appeal indicated a state of mind in the defendant that called for a sentence slightly more severe than that of the lower court.

I think that the fact of providing facilities for handling things properly for a less number of cases than the present maximum would of itself reduce the present number of cases to a point where the facilities provided would be ample. In other words, I do not think it necessary to provide at once for the maximum number of cases now handled. The present slow rate of immigration and the effects of the prohibition amendment make the future so problematical as to make it wise not to provide facilities too great for the work they will have to do.

I think that the solution of the difficulty lies in an increase of the time allotted to the criminal work of the Superior Court. It means more expense for more judges, jurors and court attachés, but no expense should be spared which will tend to maintain the dignity of the laws of the Commonwealth, and which will avert their falling into disrepute. . . .

I think, however, that it would be a mistake to condemn any judge to a permanent assignment to criminal work. If he is at all humane it would be likely to break him down in time, while if he is not at all humane he should not be a judge at all, least of all in a criminal court.

I think the suggestion [of assignment of judges for criminal work for a year with regular consultations] should be given a trial. I doubt the need of weekly consultations after the scheme is in good swing, but monthly or bi-monthly meetings would doubtless be beneficial. They would have to take place, probably, on Saturdays, which a judge in a criminal court has richly earned as a day off. Some legislative rearrangement of the times of criminal sittings might be necessary. The ideal plan would be for the Legislature to abolish present laws fixing sittings and leave it to the court to work out a schedule. Probably jail deliveries could be made more frequent than they now are in the outlying counties. Statutory regulations of sittings are very inflexible. If more frequent sittings are to be had, the laws now making it necessary to dispose of liquor and bastardy cases immediately after jail cases might well be repealed.

The commission of 1909 said in its report: —

The time may not be distant when the assignment of certain of the justices to attend specially to equity, to jury trials and to criminal matters will prove to be advantageous to the public service; and this can be done under the proposed legislation by the chief justice more easily and satisfactorily than by the action of a majority of the justices.

Accordingly, that commission recommended an act placing the power of assignment in the hands of the chief justice, and the Legislature adopted this suggestion.

We do not recommend appointment or assignment of judges for permanent service in a criminal division, or, indeed, in any division. We do believe that the assignment of judges for a year by the chief justice, under the power above mentioned, to hold continuous criminal terms and clear up the accumulation of cases and study the problems of the criminal work would be advisable as an experiment.

We also recommend as an experiment in the Municipal Court of Boston the plan suggested of requiring a defendant, at least in minor offences, to elect before trial in that court whether he wishes a jury trial. If he does, his case should be transferred at once to the Superior Court without wasting the time of the municipal court in hearing it. If he elects to be heard in the municipal court, there should be no appeal except on questions of law or the severity of the sentence. One of the great advantages of the appellate division of the Boston court in civil cases is that the judges of that court correct their own errors instead of having the case go to a higher court for retrial. This naturally encourages a greater sense of responsibility. We believe the same will be true in criminal cases. As far as the revision of sentence is concerned, the municipal court has its probation records at hand for reference in connection with the matter of sentence, so that the appellate division of that court is in a better position to revise sentences summarily than a judge of the Superior Court, who may be obliged to make use of the municipal court probation records in considering the subject of sentence.

It has been said that under such a plan almost all defendants would claim a jury, and the Superior Court would be flooded with cases more than it is now. We doubt this. The same argument was urged against the similar plan for civil cases in the Municipal Court of the City of Boston, but experience under that act since 1912 has shown that the argument was mistaken. In spite of the difference between civil and criminal cases we believe the argument will also prove to be mistaken to a large extent in regard to criminal cases if the experiment

is thoroughly tried, if arrangements are made so that cases can be tried in the Superior Court, and if such opportunities are taken advantage of by the district attorneys so that persons complained of in the district courts will not be encouraged to remove their cases in the hope of bargaining with the district attorney. At all events, we cannot know without trying it, and it is worth trying.

When the commission of 1912, on the Suffolk County courts, reported the similar plan for civil cases, they added the following words: "Experience on the civil side will better determine the wisdom of subsequent extension to criminal cases." (See report, page 15.)

We believe that the experience of the past eight years, under the act of 1912, on the civil side has been sufficient to show the wisdom of extending the same idea to criminal cases, with such adjustments of detail as are needed to adapt it to criminal proceedings. We submit a draft of an act for this purpose in Appendix A.

If it is deemed wiser to try the experiment gradually by beginning with the lesser offences, and, after experience in practice has shown the working of the plan, to extend its application later, it may be readily limited accordingly.

The suggestion that more judges be appointed has been discussed elsewhere. The lengthening of criminal terms, like the lengthening of jury-waived sittings, is under the control of the court, although there are practical difficulties. There are strong reasons why some definite periods should be fixed for the transaction of criminal business.

There is persistent criticism of the administration of criminal law, on the ground not only that sentences are frequently inadequate, but that probation, parole and pardoning powers are abused. Furthermore, it is urged that a justice of the Superior Court should preside at all sessions of the grand jury, and that the courts should exercise greater control over district attorneys in regard to the conduct, and time of trial, of cases. We will consider these criticisms and suggestions *seriatim*.

The complaint that sentences are frequently inadequate, and that probation, parole and pardoning powers are used to excess is serious. It is claimed that courts seem to have lost sight of

the necessity for adequate punishment as a deterrent of crime; that, as a result, thefts involving large amounts, wanton destruction of property, even assaults of a serious nature, not only upon men but even upon women and children, which have put the Commonwealth to large expense and much trouble for investigation, detection and conviction, have been followed by sentences so disproportionately light or by probation so ill-advisedly granted, that, to quote one critic, it "simply encourages crime and enthuses other criminals." It is further claimed that police officials become discouraged and work half-heartedly because they can see no reason for night and day pursuit of a criminal, often in bad weather and sometimes with personal danger, in order to discover and apprehend him, if the criminal is to be released on probation or, at the most, to receive a sentence not proportionate to the crime involved. It is further claimed that this tendency to leniency — especially to youthful offenders — has become so well known to them that it is an asset upon which they rely, and therefore they do not hesitate to steal an automobile worth several hundreds or thousands of dollars, feeling confident that it will be regarded, not as a crime, but as a peccadillo.

There is another criticism of the use of the pardoning or parole power whereby the criminal, waiting for a time after sentence until the public has lost interest in his case, through the devotion of his family, the assistance, perhaps, of political associates and of a soft-hearted public, and aid of friends and counsel influential with the pardoning power, obtains his release before the expiration of his sentence. These complaints deserve the most careful consideration of judges, probation officers, and those who exercise the parole and pardoning power. But we can make no specific recommendation, since the fault, if any, is neither with any substantive law nor with the machinery for its enforcement. The responsibility rests primarily upon the individual officials and ultimately upon public opinion.

It has been forcibly urged upon the Commission that a justice of the Superior Court should preside at all sessions of the grand jury. This has not been the practice hitherto. Those who advocate this procedure argue that district attorneys now have "too much power over the liberty of the citizen;" that the

grand jury is "in all routine matters entirely dependent upon the prosecutor;" that "it indicts those who he suggests should be indicted, and it dismisses presentment against those who he thinks should go free;" or, as it has elsewhere been stated to us, "A grand jury will indict without any evidence if it be the wish of the district attorney, and . . . will not indict where there is sufficient evidence if the district attorney does not care for an indictment." As a result it is claimed that the influence of district attorneys, inspired by political, personal or other similar motives, is such that sometimes grand juries indict when they should not, and at other times fail to indict when they should.

These suggestions appear to raise a serious question of constitutional law, in view of some of the language in the recent decision of Commonwealth *v.* Harris, 231 Mass. 584, and the Opinion of the Justices, 232 Mass. 601. The point decided in the Harris Case was that the presence of "one or more witnesses in the case . . . in the grand jury room . . . while other witnesses were testifying" was not proper (see page 585). In the course of the opinion the court refers to the famous case in 1681 during the reign of Charles the Second, before the Act of Settlement establishing the independence of the judges in England, in which the judges attempted, unsuccessfully, to compel the grand jury by trial in open court to find an indictment for treason desired by the King against the Earl of Shaftsbury. The court explains that since that time it has been the practice for the grand jury to investigate in secret, and states that "the examination of witnesses in the presence of others — witnesses, bystanders or judges — necessarily and inevitably subjects the accused to a public trial without right to testify in his own behalf or to be represented by counsel or attorney."

The questions submitted to the justices by the Senate for their advisory opinion above referred to were in substance: —

1. Whether, under the Constitution, the grand jury, upon the request of the district attorney or otherwise, may permit to be present at the examination of witnesses in a case a police officer who has prepared such case.

2. Whether a statute authorizing the use of interpreters before the grand jury would be constitutional.

The justices answered the second question in the affirmative, and the first question in the negative.

In answering the first question the case of Commonwealth *v.* Harris, above mentioned, and Jones *v.* Robbins, 8 Gray, 329, were referred to, and a passage quoted from the latter case that under the twelfth article of the Bill of Rights "it shall no longer be possible for one or more judges to compel or direct the examination of a witness to be held in open court before the grand jury, should the judges seek to overawe the latter or the witness by the presence of other witnesses or bystanders, or should he or they be of opinion the prosecution is too indulgently or too vindictively conducted." The justices further say that "there is no inherent necessity in the efficient conduct of investigation by the grand jury which justifies such invasion of their proceedings by strangers."

These opinions clearly recognize the undoubted right of the grand jury to examine witnesses in secret, even without the presence of the district attorney or any one else, if they wish. They also clearly establish the law that neither the court nor the district attorney can compel or ask the grand jury to examine witnesses in "open court" in "the presence of other witnesses or bystanders" or "strangers." We are not certain whether the opinions interpret the Constitution to exclude a judge alone from attending the sessions of the grand jury with their permission if any other persons are present during the examination of witnesses, so long as he does not attempt to control their judgment in the examination.

If that is the effect of these opinions, then the rights of an accused person before a grand jury are entirely in the hands of the prosecutor and his assistants and the grand jury, and if the prosecuting officer should exceed his functions only the grand jury itself can restrain or control him by excluding him if they see fit to do so. Of course, if they wanted to do so they could ask for instructions from the court as to their rights, but the ultimate responsibility will lie entirely with them. If, on the other hand, it is within the province of the court to sit with the grand jury, at their request or with their permission, if both believe that such a proceeding would add to the confidence of the community in the fair administration of its criminal law,

then the responsibility is to some extent divided between the court and the grand jury, although the ultimate responsibility will still rest with the grand jurymen by virtue of their power to exclude every one, and the court's responsibility would extend only to instructing them as to their rights in the matter in addition to instructing as to their duties in general.

In view of the long prevailing practice in this Commonwealth, and especially in view of the opinions referred to, it may well be that the court would be slow to act in the matter, and would hesitate to instruct the grand jury that they had a right to the presence of the court if they wished it (*cf.* Com. *v* Bannon, 97 Mass. 214).

Under such circumstances we make no recommendation in regard to this matter. If one interpretation of the Constitution is correct the court can now sit with the permission or at the request of the grand jury, and may so instruct them; if the other interpretation is correct this course could not be followed without a constitutional amendment.

We have been asked to recommend that courts should exercise greater control over district attorneys in the matter of directing the time and conduct of trials. So far as the time of trials is concerned we doubt the soundness of this suggestion, and do not recommend any legislation because we believe that it would limit not only the powers but the responsibilities of district attorneys in an undesirable manner.

As to the conduct of trials for similar reasons we see no occasion for altering the present relative powers of the district attorneys and the courts. In the letter above quoted, from a former assistant district attorney, reference is made to the practice of district attorneys of expecting a judge to rubber-stamp the plan of the district attorney for disposing of a case by filing, probation or otherwise. It is natural that such expectation should grow up, but it is unfortunate, and it should be remembered that the responsibility as well as the final power for such disposition rests on the court, although the recommendation of the prosecuting officer will have weight.

As a rule, the district attorneys in this Commonwealth have been men of high character, who have been mindful of the quasi-judicial character of their office, and have administered it con-

scientiously, ably and with due regard not only to the rights of the Commonwealth, but also the rights of the accused. It would be a mistake, in our opinion, to interfere with the work of district attorneys in general because of the possible shortcomings of a few. If there should be such shortcomings the public has the remedy in its own hands through the power of election.

Return Days for Criminal Cases.

By General Laws, chapter 212, section 22, the first Monday of every month is the return day for the entry in the Superior Court of appeals in criminal cases from district courts and trial justices, and by chapter 278, section 18, a defendant who appeals to the Superior Court after conviction before a district court or a trial justice is required to recognize for his appearance at the Superior Court on the return day next after the appeal is taken or be committed to wait his trial in the Superior Court. The entry of an appeal in a criminal case is a purely clerical act like the entry in a civil case, but the entry must precede trial in the Superior Court. By section 20 of chapter 212 it is provided that criminal cases shall be tried by a jury only at criminal sittings of the court, except in certain cases provided for by section 29. Section 4 provides for certain fixed criminal sittings in the various counties. If, therefore, a defendant happens to appeal from a district court at any time after the first Monday of any month his case cannot be entered until the next month, even if there is a criminal sitting of the court approaching at which he might otherwise get a chance to have his case disposed of. Accordingly if he cannot get bail he may have to wait in jail for a considerably longer time than necessary, merely because he is prevented by statute from getting his case entered on the records of the Superior Court. The Commonwealth also is interested in the prompt disposition of appeals in criminal cases.

We do not think the present arrangement is in the interests of justice, and we recommend a weekly return day for criminal cases, and submit a draft of legislation for this purpose in Appendix A.

We have received the following suggestion for relieving the Superior Court of the present congestion of criminal business: —

My plan is the creation of a court in each county, to be made up of the judges of its district courts and police courts, to be designated, perhaps, the county criminal court. One of these judges would be appointed chief justice, who would assign the other judges, in order when possible, to preside at the monthly meetings. No judge would sit on a case appealed from his own court. While he was presiding in the county court, one of the special justices would take his place in the police court or district court.

I would confer on these courts jurisdiction of all misdemeanors and of some of the lesser felonies, such as breaking and entering falling short of burglary. I would retain in the Superior Court jurisdiction of crimes punishable by death or life imprisonment, and of the more serious felonies. Bills reported by grand juries for these last-mentioned crimes could be transferred to the Superior Court for trial.

In most counties under this plan judges would not be called upon to serve at the county seat more than two or three times a year. For example, Hampden and Berkshire have five such judges each.

Very substantial advantages would accrue to the Commonwealth from this reform.

1. Twelve sessions a year in each county would give the district attorney ample opportunity to press cases for trial that ought to be tried.

2. The accused would be assured of a speedy trial. In Berkshire, now, if one accused appeals or is held for the grand jury in January or July, and cannot furnish bail, he must lie in jail six months without trial.

3. The public demand for speedy trials would be met.

4. If the criminal jurisdiction of the county courts was complete, the Superior Court would have the additional service of five or six judges for the trial of civil cases; otherwise, of probably three or four.

We do not understand that this recommendation necessarily contemplates the creation of a new court, nor should we recommend this. The proposition is rather, as we understand it, that all appeals in criminal cases from the district courts, and all indictments for misdemeanors and for lesser felonies, should be tried in the Superior Court with juries, and with a district judge of the county presiding, so that it would be a sitting of the Superior Court for criminal business with juries, only presided over by a district judge. Prosecutions would as now be conducted by the district attorney or his assistants. The great advantage of this scheme is that it would utilize existing machinery without the creation of any new courts or officers, would avoid the congestion of criminal business by providing the means for a speedy trial of all cases, and lessen the evils already described. We recommend the serious consideration of this suggestion.

2. Criminal Pleading.

Just as the pleading in civil cases in Massachusetts to-day is largely based on the work of the commission of 1851, so criminal pleading to-day is based on the report of the commission of 1898, of which unfortunately there are very few copies accessible.

The act based on this report, now included in General Laws, chapter 277, like the Practice Act based on the report of 1851, retained the main features of common-law pleading with modifications, which made it simpler, and we have received no special suggestions or complaints in regard to its operation in general.

3. Divorce.

The commission of 1909 recommended the transfer of jurisdiction in divorce to the probate courts. This recommendation caused a vigorous and thorough discussion which appears in the report of the committee on legislation of the Massachusetts Bar Association for 1910, and in the subsequent debate by members of the bar from different parts of the State at the annual meeting of that association. (See Massachusetts Bar Association Report, Vol. I, pp. 94–103, for the committee reports, and pp. 60–77 for the debate.) Most of the arguments on both sides of the question appear in that discussion. The commission which made the recommendation estimated that the equivalent of the entire time of one judge of the Superior Court was occupied with divorce matters. It must surely be not less than that to-day, and is probably more. One of the suggestions made during that discussion by an opponent of the transfer was to increase the number of judges of the Superior Court. Since that time five more judges have been added to the Superior Court, and that court has been relieved of all the work transferred to the Industrial Accident Board by the Workmen's Compensation Act. And still the problem exists of so arranging the work of courts as to enable the Superior Court to dispose of its business more promptly, and take over some of the original trial work of the Supreme Judicial Court.

The proposal to transfer the entire divorce jurisdiction from the Superior Court to the probate courts has been renewed to this Commission. We do not recommend this at present.

4. Proceedings before Trial in Civil Cases.

(*a*) Pleading.
(1) At Law.
(2) In Equity.
(3) Certificates as to Demurrers.
(*b*) Defining issues by preliminary examinations.

(*a*) *Pleading.*

(*1*) *At Law.* — The importance of pleading in many cases as a saving of time and labor in the interest of the public is likely to be overlooked by those who complain of it as "technical." Our system of pleading in civil actions at law is comparatively simple. It is based on the report of the commission of 1851, already referred to. The full report, together with the commissioners' notes to different sections and the legislative act based upon it and Mr. Hall's analysis, will be found in "Hall's Massachusetts Practice," which was published in 1851, and was entirely devoted to the study of this act. In their report these commissioners stated the purpose of civil pleading as follows: —

1. That each party may be under the most effectual influences, which the nature of the case admits of, so far as he admits or denies anything, to tell the truth.

2. That each party may have notice of what is to be tried, so that he may come prepared with the necessary proof, and may save the expense and trouble of what is not necessary.

3. That the court may know what the subject-matter of the dispute is, and what is asserted or denied concerning it, so that it may restrict the debate within just limits, and discern what rules of law are applicable.

4. That it may ever after appear what subject-matter was then adjudicated, so that no further or other dispute should be permitted to arise concerning it.

With these objects in mind, the commissioners of 1851, instead of throwing over the entire scheme of common-law procedure and substituting some new code of procedure such as was tried in other States, recommended doing away with most of the technicality, and retained the simpler portion of the common-law structure.

The main complaint which the present Commission has received in regard to pleading is the lack of definiteness which permits almost any defence, with a few exceptions, to be raised under what is called a "general denial," which allows a defendant to deny all the allegations in a plaintiff's declaration without giving any information as to the real nature of his defence unless he happens to rely on such facts as payment or the statute of limitations or a few other things which still have to be affirmatively set up. This lack of definiteness, which results in the necessity of preparing for trial on many points which turn out to be unnecessary because they are really undisputed, is one of the most serious problems in our whole system of procedure, and the methods to be considered in dealing with it are discussed elsewhere in this report. The attempts to deal with it in the past in this State may be briefly summarized by referring to the plans, since abandoned, of having pleadings sworn to, and also by the development of the system of interrogatories which may be filed for "discovery." While this last process may be valuable in many cases, yet it all has to be done on paper, and it often requires almost as much work and skill as the drafting of special pleadings at common law.

We think more is to be gained in other ways in the direction of defining issues than by special suggestions in regard to pleading. Accordingly, we make no recommendations in regard to pleading in general in cases at law.

(*2*) *In Equity.* — We have been asked to recommend that a single form of pleading should be adopted for cases at law and in equity, and that the court, upon such a pleading, should apply whatever remedy, whether legal or equitable, the facts may warrant. We do not recommend this. It is true that such a plan is in force in Connecticut and in England, but in Massachusetts we have very full power of amendment and of transfer from one side of the court to the other. Chapter 223 of the Statutes of 1883, which extended equity jurisdiction to the Superior Court, eliminated, by section 10, the verbosity of earlier equity pleading, and simplified it very materially. The substance of this provision still appears in General Laws, chapter 214, sections 12 and 13.

In 1887 a statute was passed (chapter 383 of that year) providing that —

> Suits in equity may be commenced by bill or petition with a writ of subpœna according to the usual course of proceedings in equity by an original writ of summons or by summons and attachment or by the trustee process, or may be commenced by declaration in an action of contract or tort, as the case may be, etc.

This was an attempt to allow an attorney to file almost any kind of paper which he wished, and throw the entire burden of the matter on the court. The practice of asking for equitable relief by filing "a declaration in an action of contract or tort" was seldom used because it did not really help anybody, and it merely tended to confuse the court, the parties and the record. In view of the freedom of amendment allowed from law to equity or from equity to law, there was nothing to be gained by attempting to confuse the two proceedings in the manner authorized by the statute. The provision in regard to "a declaration in an action of contract or tort," which was retained in Revised Laws, chapter 159, section 8, was, accordingly, cut out by chapter 183, Acts of 1909, and these words do not appear in the General Laws, chapter 214, section 7.

We see nothing to be gained by attempting to consolidate the method of pleading into a single form when the statutes already provide free opportunity for amendment and transfer.

(3) *The Requirement of Certificates with Demurrers at Law and in Equity.* — We think the requirement of certificates with demurrers both at law and in equity should be abolished. We think that the use of perfunctory certificates and affidavits in connection with very many papers to-day is overdone, and the common requirement of an oath, instead of adding any special sanction to the document thus sworn to, rather tends to bring the sanction of an oath into contempt.

We annex a draft of an act to cover this recommendation.

(b) *Defining Issues by Preliminary Examinations.*

The discussion of pleading naturally leads to the consideration of methods of defining issues before trial which the earlier technical system of pleading was intended to accomplish, and

which the present looser system does not accomplish. We believe this can be done in four ways: —

(1) By providing for oral depositions of parties before trial, and in such case making discovery by written interrogatories discretionary with the court to avoid abuse.

(2) By providing for an affidavit by each party of all material documents in his possession, and the right of the other party to inspect them, subject to the supervision and control of the court.

(3) By extending the right to take depositions of witnesses other than parties, so that they can be taken at any time after suit brought.

(4) By gradually developing, so far as practicable under our system, the practice of preliminary definition of issues by the court, with the assistance of the processes above described.

These four methods will be discussed separately.

(*1*) *Oral Examination of Parties.* — A century ago Jeremy Bentham made a suggestive classification of methods of procedure into "epistolary" methods and "confrontatory" methods, and he made caustic remarks about the "epistolary" kind. The comparison may be simply translated into the statement that one can generally find out more quickly about facts by talking directly to a man who knows about them than by conducting a long and cautious correspondence with him or with somebody representing him. This simple idea has been very gradually forcing its way into legislation and rules of court relative to procedure.

We have had in Massachusetts, ever since 1851, a statutory system for what is called "discovery," by which either party may file written interrogatories to the other party, to be answered under oath before trial, as to material matters. For many years the scope of the right of discovery was quite strictly limited and comparatively little use was made of it. Recently, by statute, its scope has been considerably extended, but the machinery by which the right is exercised involves a very considerable amount of labor and skill, as already stated.

In addition to this, while the statutes and rules of court call for answers to interrogatories thus filed within a specified number of days, it is common for parties not to answer the questions until ordered to do so by the court, after a motion

and hearing in which the court is asked to specify which of the questions the party should answer. Often these written questions are filed in such numbers that the work of reading them and deciding which questions should or should not be answered occupies much time, and the records are needlessly burdened.

The statute in regard to interrogatories was revised after considerable discussion in 1913 by chapter 815 of that year. The history and effect of that statute, and the opportunities for abuse which have to be guarded against, are described in the report of the committee on legislation of the Massachusetts Bar Association for 1913 (pages 39–43). By the recent decision in Cutter *v.* Cooper, 234 Mass. 307, the court has interpreted liberally the words of the statute. This process of discovery by interrogatories, however, takes place entirely on paper, and has the weakness and inconvenience of its "epistolary" character. In order to secure the benefits of preliminary investigation, something more than a provision for a tedious, inconvenient and difficult system of written examination appears to be necessary.

The right to take depositions in Massachusetts is limited by General Laws, chapter 233, section 25, to —

> A witness or party [who] . . . lives more than thirty miles from the place of trial, or is about to go out of the commonwealth and not to return in time for trial, or is so ill, aged or infirm as to make it probable that he will not be able to attend at the trial.

The deposition can be used at the trial only if the circumstances which justify the taking of it continue at the time of trial.

New Hampshire in 1867 extended the right to take depositions, and since then has had a statute which appears as Public Statutes of New Hampshire, chapter 224, section 1, as follows: —

> The deposition of any witness in a civil cause may be taken and used at the trial unless the adverse party procures him to attend, so that he may be called to testify when the deposition is offered.

Section 2 provides: —

> Whenever the deposition of a party to an action has been taken it shall within ten days thereafter be filed in the office of the clerk of the court in which the action is pending. Either party may use the deposition upon the trial of the cause unless the deponent is in attendance.

Such deposition of the party may be used as a declaration or admission at the trial, even though the party is present in court (see Phœnix Mutual Life Insurance Co., 58 N. H. 164). It may also be used after the death of the party (see Bundy *v.* Hide, 50 N. H. 116).

Since about 1858, in Wisconsin, there has been a statute providing for an oral examination of parties, not only for the purpose of preparing for trial, but for the preliminary purpose of pleading (see Wisconsin Statutes 1915, chapter 176, sections 4095*a*–4102). For the effect of this statute see Kelley *v.* Chicago & North Western Ry. Co., 60 Wis. 480 (especially at pages 487 to 489).

Our present Massachusetts statutes provide for an inquest in case of death by accident upon "a railroad, electric railroad, street railway or railroad for private use," and "any case of death in which a motor vehicle is involved." At such inquest in the case of railway accidents a verbatim report of the testimony sworn to by the witnesses is to be made and forwarded forthwith to the Public Utilities Commission (see General Laws, chapter 38, section 11), and one of the Commission's inspectors is required to investigate promptly any accident and to attend the inquest, and he "may cause any person who has knowledge of the facts or circumstances connected with such death to be summoned as a witness to testify at the inquest." (See General Laws, ch. 159, sect. 29.)

These provisions in regard to inquests are, of course, primarily for the purpose of ascertaining whether any crime has been committed, or any failure in public utility service has occurred, but the policy which they reflect, that it is in the interest of justice that information be obtained in regard to such accidents from the persons who saw them by prompt examination, is a policy which seems as sound in regard to civil business as it does in regard to criminal business.

Under Rule 38 of the Superior Court, adopted in 1916, it was provided that —

> A party by notice in writing served not less than ten days before the case is put on the daily list for trial may call upon the other party to admit for the purposes of that trial only, any fact which he deems

material and not to be in dispute or the execution of any written paper which he intends to use for such trial. (See also General Laws, ch. 231, sect. 69.)

This rule was in addition to the statutory right already existing to interrogate parties.

We are informed that very little use has been made of this rule, and doubtless the reason is its "epistolary" character, added to the fact that many lawyers hesitate to run the risk of teaching the other side something about their case, or because they prefer, from habitual practice, the method of going to trial without preliminary investigations, even though it involves additional preparation to prevent surprise.

On the other hand, the clients are usually the ones who pay the cost of litigation, and the citizens are the ones who pay the bills for the judicial system, and, if practical methods can be devised for reducing cases to more definite issues in advance of trial, it is desirable that they should be tried in order that, if successful, they may avoid much waste of judicial power.

We recommend legislation as to the oral examination of parties, and submit a draft herewith in Appendix A.

If this suggestion is adopted we recommend that no party be allowed to use both the oral and written methods of interrogation except by leave of court, so that parties may not be unreasonably annoyed.

(2) *The Affidavit of Documents.* — We recommend a provision for an affidavit of documents upon the written demand of either party, as shown in the draft of legislation in Appendix A.

This practice has been in common use for many years in other jurisdictions.

(3) *Depositions of Witnesses.* — While we believe an extension of the right to take the depositions of witnesses along the line of the New Hampshire statutes above quoted will also be advisable, we think it wiser to try the experiment with the examination of parties first instead of causing confusion by suddenly expanding the machinery in two such important directions at once.

(4) *The Practice of defining Issues.* — It has been said upon the best authority, and it is generally agreed by those who have applied, or observed, the practice in the English and in some of

the Canadian courts, that one of the most effective methods of despatching business and avoiding unnecessary waste of time, money and effort in the trial and hearing of cases is the system of preliminary examination of parties or their counsel, either before the court or before an official master, to ascertain definitely what are the actual points of dispute between the parties and what questions are undisputed, so that the real issues in the action may be ascertained in advance and the trial directed to the decision of those issues. Such a preliminary investigation often results in the settlement of a case without trial.

Under the English practice, the process for such investigation in the highest courts is called a "summons for directions," and the parties or their attorneys appear before a permanent official, called a master, or, in the county courts, before the "registrar," who settles all interlocutory matters, gives directions as to the production of documents and as to what documents, if any, should be protected from inspection; and as to the issues or questions upon which the case is to be sent to trial. Thus much time is saved when it comes to trial because of the fact that the case has been brought down to its proper limits, and the taking of unnecessary evidence and the expense of preparing for the taking of such evidence, because of uncertainty, is avoided.

The Rules of the Supreme Court of New Jersey (1919 edition), under section 17 of the Practice Act of 1912 and the rules attached thereto, provide that —

> The Supreme Court may designate for each county one of the Supreme Court commissioners (and, if necessary, more than one), removable at pleasure, who shall have the authority herein given. (Rule 61, Practice Act, 1912.)
>
> At any time after service of the complaint, either party may take out a summons substantially in the form in Schedule B, and serve the same upon the opposite party or his attorney, at least four days before the return day. The summons need not be served upon a party who is in default. The taking out of such summons by a defendant shall be deemed an appearance in the cause, if he shall not previously have appeared therein. The court may, on its own motion, at any time, order the preliminary reference herein provided for. (Rule 62, Practice Act, 1912, modified. See Form 32.)
>
> Upon the return of the summons, or at any adjournment of the matter, the commissioner, after hearing the parties or their attorneys (but not their evidence), shall, on the application of any party, make such order

as the court might make and as may be just in respect to the following matters, subject to an appeal within five days to a judge of the court in which the action is pending: —

Objections to pleadings (other than those provided for in Rules 40 and 56), amendments thereof, and leave for additional pleadings: settlement of issues; bills of particulars; admissions; interrogatories; discovery of, and inspection of books, papers or other documents; examination of parties before trial.

Any other interlocutory matter preliminary to, and in preparation for, trial, but not including postponement of trial.

The order of the commissioner shall be deemed the order of the court until reversed.

All motions in respect of any of the foregoing matters, whether made before or after issuing the commissioner's summons, may be heard and determined by the commissioner, subject to appeal as aforesaid.

The commissioner's order shall be as nearly as practicable in the form stated in Schedule "B." (Rule 63, Practice Act, 1912. See Form 33.)

Prior or subsequent applications or motions in the cause before trial may be made to the commissioner on two days' notice. (Rule 64, Practice Act, 1912.)

If plaintiff fail to take out and proceed upon the summons as herein directed, when so ordered, he may become non-prossed. If defendant fail to appear he shall not appeal from the order except by leave of the commissioner or the court. (Rule 65, Practice Act, 1912.)

No. 32. PRELIMINARY REFERENCE. COMMISSIONER'S SUMMONS.

(Title) *Commissioner's Summons.* (Rule 93.)

To , *Defendant:*

On motion of plaintiff, you are hereby notified that on the tenth day of January, instant, at 10 o'clock A.M., at my office, No. 10 Street, Trenton, I will hear any motions that may be made by either party in the above-stated cause respecting the pleadings, issues, evidence or any other matter preliminary to, and in preparation for, trial; and will make such order respecting the same as the parties respectively may be entitled to.

Supreme Court Commissioner.

Dated JAN. 4, 1912.

No. 33. COMMISSIONER'S ORDER. (Rule 94.)

(Title) *Commissioner's Order.*

Having heard the parties (or, having heard the plaintiff, the defendant not appearing, though duly summoned), it is ordered that: —

1. *Pleadings.* — Complaint be amended by stating where the contract therein stated was made.

2. *Issues.* — The issue to be tried upon the first count is whether or not

the letter dated June 1, 1911, written by plaintiff to defendant, accepting defendant's offer to sell, was mailed within a reasonable time after receipt of that offer.

3. *Particulars.* — Plaintiff, within ten days, serve fuller particulars as to the items of his claim under the second count.

4. *Admissions.* — It is admitted that (state relevant facts which are not disputed, other than those admitted in the pleadings).

5. *Interrogatories.* — The first, fifth, seventh and tenth are struck out. All others allowed.

6. *Discovery of Documents.* — Plaintiff, within five days, serve a list under oath of all documents under his control which are relevant to any issue in the cause, except his personal diaries and his books of account.

7. (Continue as to other matter, if any.)

Supreme Court Commissioner.

Dated JAN. 10, 1912.

We are informed that the New Jersey rule is administered by circuit judges who have been appointed commissioners for this purpose.

We believe that with the increasing rapidity of modern methods of business required by the varied amount of work to be done and its complications some such system may be needed in modern courts. No legislation is probably needed in regard to defining issues at present at least. If a closer study of the inherent functions of the courts and the existing rule-making power should develop the need of legislation the matter can be brought up later. We think that the court has sufficient power now to act by rule upon this matter.

5. THE NEED OF PROCEDURE FOR DECLARATORY JUDGMENTS.

The frequent and effective use during the war of the English procedure for obtaining declaratory judgments has attracted attention in America, and within the last two or three years a number of articles have appeared in American law magazines explaining the nature and value of this proceeding. Statutes providing for it in various forms have been adopted in some States. A form of such a statute has been circulated by the American Judicature Society. The subject has been discussed by various bodies, and an act has been presented to Congress to provide such procedure for the Federal courts. A thorough

study of the subject appears in an article by Prof. Edwin M. Borchard in the "Yale Law Journal" for November and December, 1918, which was reprinted by the United States Senate committee on the judiciary in the 65th Congress.

This proceeding appears to have existed in various forms in European countries during the Middle Ages, but its introduction into English law resulted from the practice in Scotland, where, for upwards of three hundred years, the "action of declarator" appears to have been an established proceeding. Early in the nineteenth century Lord Brougham urged its introduction in the English courts, with the support of other leading lawyers. About twenty years later, in 1852, the first English act was passed, and in 1883, by what is known as Order 25, Rule 5, of the Supreme Court Rules of 1883, the present English practice was provided for under which this method of administering justice in proper cases is now available.

In Massachusetts certain limited forms of declaratory judgments have long been in common use, although not known by that description. The most obvious example of it is the registration of title to land. In other words, the Land Court was created in 1898 for the primary purpose of "declaring" title to land. Still older forms are the common bills for instructions by trustees and others for the interpretation of written instruments and bills in equity to quiet title. Probably if our statutes were thoroughly analyzed a considerable number of varied forms of the application of the idea involved in a declaratory judgment would be found under differently described proceedings, such, for instance, as the proceeding by which a wife may obtain a decree declaring her right to live apart from her husband without interference, and her right to convey and deal with her own property for justifiable cause. But the more general application of the idea is not available to-day in Massachusetts in many ways in which it might be used to great advantage in commercial and other cases in which there is now no method of obtaining a binding declaration of rights and duties in actual controversy, if no technical violation of right or duty has occurred, and cannot, perhaps, occur without serious risk of loss to one party or the other.

Just as equity jurisdiction developed from the actual needs

of the community because the strict rules of the common law furnished no adequate remedy in many cases as life and business became more varied and complex, so we believe the time has come when this form of proceeding may be extended to the great benefit of the community.

Accordingly we recommend the passage of the act submitted in Appendix A. As the proceeding is equitable in its nature we have prepared the act as an addition to the equitable jurisdiction of our courts.

6. Writs, Return Days, Appearance and Answer.

It has been suggested that the form of writs and summonses be revised in order to state more accurately what the writ requires a person on whom it is served to do. This is an important suggestion of detail which deserves consideration, as the traditional form of writ and summons now in use gives no intelligible information to a layman upon whom it is served. If he does not consult a lawyer in time he may be misled by it to appear in court when he is not wanted, and, if he does not ask enough questions of some one, he is likely to be defaulted because the paper served on him does not tell him what to do. The present form of summons is apt to frighten without instructing. This matter is within the rule-making authority of the court, which includes the power to alter the form of writs, and is one of the subjects which should be considered by the court and by the judicial council, if it is created. It is of special importance in the district courts, particularly in large cities where most of the smaller suits are brought.

Return Days.

The first Monday of each month is the day for entering cases in the Superior Court. In beginning a lawsuit the first step is the drawing of a writ and the service of the writ on the defendant, ordering him to appear on the first Monday of some ensuing month. The order to appear does not necessarily mean that he must appear in person, but that he must enter his appearance in person or have an attorney enter an appearance for him in order that he may not be defaulted.

The writ must be served at least fourteen days before the return day at which he is called upon to appear, in ordinary cases of resident defendants in the higher courts.

When the return day arrives the plaintiff must file his declaration or statement of his claim in the court to which the writ is returnable. The defendant is allowed twenty-one days from the return day in which to enter his appearance and file his answer. In the ordinary case, therefore, there is a period of at least five weeks, and usually more, from the time the action is commenced before the pleadings are required to be completed so that the case is ready to proceed.

Formerly suits at law could be entered only at periods several months apart. Now for many years suits have been entered every month. An equity suit may be entered on any day of the year, and the service of process usually follows the entry. It has been suggested that writs in cases at law should be made returnable on any day. But one reason for having a fixed return day is that it is practically convenient for the clerks of court and the bar to have a day certain for the entry of cases, which enables them to arrange their work accordingly and makes it easier to remember the date.

In the district courts every Saturday is a return day, and seven days is the required period of service before the return day in most cases, with three days for appearance and four days for answer after the return day.

While there are marked differences of opinion among experienced practitioners and clerks of courts in regard to the desirability of shorter periods between the commencement of a suit and the completion of the pleadings, we see no sufficient reason for retaining the monthly return day. We believe that in a great commercial community shorter periods are desirable and practicable in legal proceedings, and that the substitution of the weekly return day every Monday in the Supreme Judicial and the Superior Courts will be for the benefit of the clients.

Accordingly we recommend an act for this purpose submitted in Appendix A.

It has also been suggested that the period of service before the return day should be reduced to ten days; that the time

for appearance and answer after the return day should be shortened to ten days; and that provision be made that a writ and summons with which a suit is commenced by service on the defendant should contain a brief abstract of the nature and amount of the plaintiff's claim for the information of the person against whom the claim is made, instead of the present vague statement that the action is in contract or tort, which may give no information unless the defendant knows in advance the nature of the claim. We believe these suggestions worthy of consideration, and that the resulting difficulties in practice anticipated by some would not develop seriously if the experiments were tried. We believe, however, that such changes in practice should be introduced gradually, and therefore make no recommendation in regard to them at present except the provision for a weekly return day, as already explained.

7. Costs.

(*a*) *Fictitious Costs.*

The question of abolishing "fictitious" costs, as they are called, which has been discussed before the Legislature from time to time, has been called to the attention of the commission.

We recommend the abolition of the fictitious items. We believe that the practical reasons which led to the establishment of such items have disappeared, and no sufficient new reasons have developed to outweigh the disadvantages and suspicion of the law likely to arise in the minds of laymen from the taxing of specified items for "travel," "attendance," or "term fees," particularly in cases which are never tried, when every one knows that nobody traveled or attended, and nobody but the lawyers understand why these items are taxed.

We believe that all actual and necessary disbursements, such as entry fees, costs of service, witness fees, actual attendance of parties and actual travel for this purpose, necessary printing, etc., should be allowed as costs, and that the matter of an attorney's fee, if allowed at all as a part of the taxable costs, should be left to the regulation of the court, both as to the amounts and the occasions on which it should be allowed.

(*b*) *Costs in Trustee Process.*

Persons summoned as trustees, supposed to hold funds or goods of a defendant in an action which the plaintiff seeks to attach by trustee process, are often put to very serious inconvenience and expense by plaintiffs who serve writs on the chance of catching something by the attachment, or sometimes, by deliberate abuse of the process, merely to get jurisdiction in a particular county or district, although the plaintiff does not believe that the trustee holds any property which can be attached. The present provisions for costs to the trustee are absurdly unfair, considering the trouble and expense to which he is subjected through no fault or interest of his own. We believe the question of trustees' costs should be left to the fair judgment of the court.

(*c*) *Costs in General.*

The system of costs has never been thoroughly studied here in its relation to the problem of "the law's delay" and the public expense of adminstering justice. Certain items of cost have been fixed, such as entry fees, etc., to contribute to some extent to the public expense of maintaining the court. Other arbitary items, already discussed, have been fixed as part of the compensation to the winning party. But the real use of "costs" as a measure of public economy has never been seriously attempted in Massachusetts, although the statutes are full of clauses authorizing the courts to "impose terms."

We think this subject should be studied with a view to adjusting the items of cost to the actual facts so far as it is reasonable so to adjust them.

We annex a draft of iegislation in the Appendix to carry out our recommendations.

8. Records.

Since the coming of income tax returns, and all the papers that had to be made out during the war, the people have probably developed a healthy dislike for the accumulation of waste papers in public offices. The general public has little

conception, however, of the amount of unnecessary papers which are not only filed in court, but are copied in record books and stored at public expense. We believe that a study of this subject could not fail, in the course of time, to result in an enormous saving of time, space, money and clerk hire.

The courts have been too busy to examine the matter thoroughly, and it has been nobody's business. Habit has given an artificial sanctity to much unnecessary verbiage in our records, and it has always been difficult to shorten them in consequence. An important beginning was made in 1912 by chapter 502 of that year, which shortened the forms of deeds by cutting out unnecessary clauses and words which were being copied into the records over and over again and stored at public expense. But the change came only after a discussion which lasted forty years.

We believe that a careful study of the forms and records now in use in various courts would result in eliminating waste words and paper in many directions. The manner in which even new record offices fill up is an obvious warning of the results of the interminable recopying over and over again of unnecessary words in record books.

As an illustration of what now results from a statute sanctified by habit, we call attention to the requirements on the appointment of an executor or administrator without sureties. The statute requires that every executor, administrator and trustee appointed by the probate court shall give a bond. Where sureties are required, some form of bond is needed, but in many cases sureties are not required. The only obligation of the bond is to do what the fiduciary is already required by law to do.

The bond copies certain specified requirements of the statute, and the only use that the bond ever had was to lay the foundation for action at common law if the obligation was not performed. It is simple to provide that an action may be brought to enforce the statutory liability without a bond, although such a proceeding is hardly likely within the State, since General Laws, chapter 206, section 4, gives the probate court power to enforce the liability of the fiduciary directly in the same manner as if a judgment had been recovered at law. The

fiduciary is also liable to proceedings in equity to enforce his liability, and this was the only means of enforcing the liability of a trustee or guardian, who was not obliged to give a bond where no sureties were required until 1873 (chapter 122) and 1880 (chapter 34). (See Parker *v.* Sears, 117 Mass. p. 122.)

But now every time an administrator or other fiduciary is appointed, a decree is entered on one sheet of paper and that is copied in a book; a bond is filed on another sheet of paper and that is copied in a book; a so-called "letter" of appointment, which is a formal notice to the executor, is issued on a third sheet of paper and that is copied in a book (see General Laws, chapter 215, section 36). Neither the bond nor the letter adds anything whatever to the liability of the fiduciary, which exists under the statute as soon as the decree is signed by the court. The letter, like the bond, contains merely a repetition of the words which appear in the statute. This illustration suggests that many similar illustrations of unnecessary repetition can be gradually found and eliminated in order to save time, space and money of the public without affecting the substantial portions of the necessary permanent records.

As one step in the right direction we submit in Appendix A a draft of an act to dispense with a probate bond where no sureties are required.

9. Venue of Transitory Actions and the Power of Transfer of Such Actions.

Our attention has been called by lawyers in the extreme western part of the State to a practice which has naturally developed because it is allowed by the statutes, but which seems a serious hardship in certain cases, under sections 1 and 2 of chapter 223 of the General Laws.

The situation is described in the following extract from a letter to the Commission: —

(1) The first matter relates to the case of suits on non-negotiable causes of action arising out of contracts. The rule is that when suits are brought in the Superior Court, if the plaintiff is a nonresident, the suit must be brought in the county where the defendant lives. If both parties are resident, then in the county where either party lives at the

option of the plaintiff. It has been brought to the attention of many of us attorneys in this part of the State that it is becoming the common practice for certain lawyers in Boston to have claims held by nonresidents assigned to the clerks in their offices, and then suit brought in the name of the assignee in the Superior Court for Suffolk County. This entails great expense on the part of the defendant if he wishes to contest, and very often, where the claim is not of a large amount, results in an invalid claim being paid rather than chance being put to the trouble and expense of going from western Massachusetts to Boston, together with his counsel and witnesses. Many of us in Berkshire believe that there should be legislation causing such suits to be brought in the county where the defendant lives, unless the plaintiff was actually a party to the original contract on which the claim is based.

(2) Under present statutes suits may be brought in the police, district or municipal court, where the parties live in different counties, in the county where the party named in the writ as trustee lives or has his place of business. This proposition also has led to abuses, as a trustee is named in the writ when the plaintiff really has no belief that the person named or the corporation named as trustee actually is a debtor of the defendant, but only in order that the suit may be brought in the county where the plaintiff lives. It seems to us that either the court should have in its discretion the power to change the venue of the action with costs . . . when it appears that the trustee was named only in order to provide a venue for the action, or else the rule in actions brought on trustee writs should be the same as in other transitory actions, namely, that it should be brought in the county where the defendant lives, in case where the suit is brought in the district, police or municipal courts. This is really no hardship to the trustee, as no personal appearance is necessitated on the part of the trustee or his counsel, and it would also do away with many cases which are more or less holdups in their nature.

The situation is further illustrated by the following case in the Municipal Court of Boston. The plaintiff was a New York corporation; the four defendants all lived in North Adams; the trustee was the American Railway Express Company; and the goods, which were caught in transit, were en route from Pittsfield to North Adams. The only person whose convenience was in any way served by the venue in Boston was the plaintiff's counsel. It certainly does not seem fair that in such cases defendants should have to come to Boston to defend themselves.

We submit in Appendix A drafts of two acts to cover cases like those described.

V. DISCUSSION OF OTHER MATTERS.

1. The Need of Repeal of Certain Statutes imposing Non-Judicial Duties upon Judges.

There are certain functions which are naturally incidental to the administration of justice and which are properly performed by the courts or by the judges, but occasionally duties have been imposed upon the judges by statute which seem to fall outside of the scope of the work which judges should be asked to perform. While this does not happen very frequently, there are a few statutes which the Commissioners believe should be repealed.

The first of these is Statutes 1894, chapter 453, which makes the justices of the Supreme Judicial Court, and in practice the chief justice of that court, the "chief janitors" of the Boston Court House. Hon. William C. Loring, until recently a member of that court, has described clearly, in the "Massachusetts Law Quarterly" of August, 1920, the additional burden which this places upon the court and particularly upon the chief justice, and the way in which it interrupts the judicial business of the court, for which all their time and strength is needed. Such a burden should not be placed upon the shoulders of the chief justice and his associates, however obliging they may be in the performance of the duties thus referred to them by statute. We therefore recommend the substitution of some other person or persons in the statute referred to to perform these duties.

So, also, the justices of the Superior Court are called upon by General Laws, chapter 36, section 31, to appoint, and if necessary remove, index commissioners. We recommend the transfer of this duty to other persons.

In 1915 the Legislature created a censorship board for theatrical performances in Boston, consisting of the mayor, the police commissioner, and the chief justice of the Municipal Court of the City of Boston (see chapter 348, Special Acts of 1915). The duties and responsibilities imposed upon the censorship board by that act are not judicial. They are of an executive character in spite of the fact that they require judgment. The chief justice of the municipal court has enough to do in connection with his court without making him a preliminary

censor in such matters. We recommend the omission of the chief justice from this board. We have drawn no acts to carry out these recommendations, as they involve substituting some other persons to act in place of the judges, and this does not come within our province.

2. Legal Aid.

A proposal was submitted to the Constitutional Convention in 1917 to amend the Constitution by providing that the justices of the Supreme Judicial Court might make rules or take any other action to guarantee that no subject of the Commonwealth shall, because of poverty, be denied access to the courts, or proper representation therein, in any proceeding, whether civil or criminal, and that such power should extend to provisions concerning the payment of court costs, the assignment of counsel, the creation, control and supervision of organizations or bureaus to render legal aid and assistance to poor persons, and to the expenditure of such sums of money as might be appropriated by the Legislature for these purposes. (See Convention Document No. 8.)

This proposal was not adopted, and whatever reasons might be urged in support of it in other States, we think that in Massachusetts it is unnecessary. As a concise statement of various suggestions which call for consideration, it serves, however, as a good introduction to this part of the report.

The power to relieve from costs deserving persons who are unable to pay them never appears to have been exercised in Massachusetts, presumably because of the apparently sweeping language of the statutes relating to costs. The construction of such statutes is discussed in 4 Massachusetts Law Quarterly, 323, at page 332. It is there argued that this matter lies within the rule-making power of the courts as an inherent common-law function, and that the statutes must be construed accordingly as showing no intention on the part of the Legislature to restrict this power.

However that may be, in view of the long disuse of the power, if such power exists, we submit to the judgment of the Legislature whether an act declaring that the courts have this power is needed for the protection of deserving persons.

Legal Aid Societies.

The development of legal aid societies during the past twenty years throughout the country is one of the striking developments in the profession. The work of the Boston Legal Aid Society has been a marked success. It deserves all the support which a generous community is ready to contribute to one of the most important "social" experiments of recent years.

It has been suggested that the State should take over this work as an established public function, to be conducted under judicial control as part of the administrative work of the judicial system, but for the present we believe that such work should be left to private organizations supported by individual contributions. Our reasons will be more fully stated in connection with the following topic.

3. Public Defender.

The development of the idea of a "public defender" is summarized in a statement of Mr. James Bronson Reynolds, chairman of the executive committee of the Voluntary Defender's Committee of New York City, printed in the "Journal of the American Institute of Criminal Law and Criminology" for August, 1920, as follows: —

> The provision of proper counsel for the defence in criminal cases is one of the twentieth century demands, . . . the answer to which needs peculiarly to be settled by inquiry and experiment rather than by theory. That some better provision must be made than exists at present is generally testified by judges, district attorneys and others who observed our criminal courts in various relations, but as to the form of provision there is much variety of opinion. In Los Angeles, for instance, we have the public defender named by the county board of supervisors, and in Connecticut he is named by the judges of the Superior Court. In New York he is named by a committee of citizens. In the first two instances the office is a public one; in the last it is a private office under the direction of a citizens' committee. There is evidently no agreement yet as to the proper source of appointment, and the ultimate choice between these various methods is yet to be determined.
>
> In New York the appointment of a public defender was carefully considered by committees of the bar association and the county lawyers' association, respectively. The work of the public defender was approved as desirable, but it was the almost unanimous judgment that it could best

be done by private counsel employed by a citizens' committee. The Voluntary Defenders' Committee was therefore formed, including men and women who had touched the problem of the public defender in various intimate relations, and it was decided to undertake the work for three years as an experiment, giving special attention to the lessons derived therefrom in relation to the continuance of the work and its future character. This attitude of open-minded inquiry has kept the movement from many mistakes. Such, for instance, would have been the passage of a bill before the New York State Legislature urged by well-meaning but inexperienced advocates of the public defender. The bill created the office of public defender with a salary equal to that of the district attorney, and a staff of assistants nearly, if not quite, equaling the staff of the district attorney. The three years' experience of public defender in New York has made it clear that no such office with numerous assistants is needed. During the past three years the public defender of New York has had but one assistant, and yet he has been able to handle approximately half of all the assigned felony cases; that is, half of the most serious cases which would have been assigned to the public defender if such an official position had been created. The public defender in Los Angeles County has but four assistants on the criminal side, while the staff of the district attorney is more than double that of the public defender. Yet the former is able comfortably to handle all his cases, though he himself also supervises the civil side of his work, while the district attorney gives his whole time to criminal cases.

The public defender in Los Angeles stated to the writer that he himself believed it to be undesirable that he should receive a salary equal to that of the district attorney. The public defender in New York receives a salary half as great as that of the district attorney and the same as that of a first assistant district attorney. This amount was fixed because it was believed the public defender should have a salary equal to that of the men whom he was meeting daily in court, and because it seemed this amount was needed to enable a man of proper ability to undertake the work.

Further, acting on experience rather than theory, and after valuable conference with lawyers of the Bar Association and the County Lawyers' Association, a step forward has been taken for the next three years in uniting the Voluntary Defenders' Committee with the Legal Aid Society. What will be the ultimate character and form of the work will be decided on the same sound basis. The work may ultimately become a feature of the State or city government, or it may remain a philanthropic enterprise, but we trust the decision will be determined by wise consideration of the needs and actual experience, not by theoretical prejudgment. The present writer has no prejudice against an official public defender, but he has had extensive experience in the good results obtained by using private philanthropy to try out the character of the work to be done where the need of the service for the public was believed necessary. It

may be found that only public service will meet the need. It may be found that existing machinery of government slightly adjusted will suffice. It may be found that all and more than the theorists claimed is needed, but the experiment undertaken with the flexibility of private action settles the matter beyond a reasonable doubt, and the public thus duly informed and rightly guided can usually be trusted to do the right thing. (Pages 283 and 284.)

In Massachusetts the experiments with a voluntary defender have not been developed as they have been in New York. The funds of the Legal Aid Society have not been sufficient to enable them to meet fully the need of assistance in regard to civil business, and accordingly there has been no opportunity for them to develop the criminal side of the work.

In view of the experimental stage of this work we cannot make any definite recommendation, but believe that the subject is worthy of careful study.

4. County Lines.

The subject of county government and its advantages or disadvantages is beyond the scope of this report. We merely discuss certain practical ways in which county lines affect the courts as the subject has been brought before us. The adherence to county lines in arranging judicial sittings and districts without regard to transportation facilities and railroad timetables obviously causes expense, inconvenience and delay in some parts of the State.

There are two reasons among others, perhaps, which may be used for clinging to county lines in this matter, — first, the practical reason that the county lines divide the expense of the courts between the counties; second, the idea that there is some constitutional requirement, especially in criminal cases, that men accused of crime shall be tried in the county where the alleged crime was committed. We do not think either of these reasons convincing.

It seems almost unnecessary to point out that no person, whether involved in a civil or a criminal case, has any constitutional right to the existence or continuance of county lines. The right of a man to be tried by a jury "in the vicinity," while it has been historically connected with the idea of counties, is

really a reasonable right and not a formal and an unreasonable right attached to any particular county lines without regard to the development of transportation facilities. In the State courts under existing statutes it generally means the county in which the offence was committed, but it was decided in 1824, in Commonwealth *v.* Parker, 2 Pick. 550 (see also Com. *v.* Gillon, 2 All. 502), that this was not a constitutional requirement. The counties, of course, can be abolished, or their lines may be changed as the lines of Suffolk County have been constantly changed by the annexation of adjoining towns from time to time. It is desirable that the sittings of courts should be arranged mainly with a view to the disposition of the business as conveniently as possible for the different parts of the community, after careful study of the timetables and the geography and general transportation facilities in the different neighborhoods. If it is more convenient that part of the business in one county should be heard at some place in another, it is desirable that it should be heard there. The jurisdiction of the Superior Court extends throughout the Commonwealth, and the State could probably be arranged in judicial districts more convenient for the people of those districts than the present county lines. If the question of apportionment of expense for juries, etc., should arise as a result of any such changes, this matter might be submitted to the Governor and Council or some other body for decision.

This subject was briefly referred to in connection with the district courts by the joint committee of 1892. That committee said, on page 13 of its report (Senate, No. 31, 1893): —

> There are some instances where a town will be better accommodated by being connected with some court outside the limit of the county. We have not seen fit to depart from the established precedent, but, if the question of expense could be adjusted between the counties, it would doubtless be wise to disregard county lines. South Hadley is a noticeable illustration. Everything except the county line seems to favor its annexation to the district court at Holyoke.

We make no recommendation on this subject and merely submit the foregoing suggestions to indicate that it may be possible in the future, if it seems advisable, to separate the arrangement

of judicial districts from the general question of county government. We doubt, however, if the people of the Commonwealth are ready for such a step at present.

5. Admission to the Bar.

In August, 1916, before a large gathering of lawyers from all parts of the country at Chicago, Hon. Elihu Root, then President of the American Bar Association, delivered an address entitled "Public Service by the Bar," of which thousands of copies were distributed, and which was printed for further distribution in various periodicals. In the course of this address he said: —

> . . . Few ideas have been more persistent throughout this country than the idea that the prevailing consideration in determining admission to the bar should be that every young man is entitled to his chance to be a lawyer, and that all requirements of attendance in offices and law schools and for difficult examinations are so many obstacles in the way of liberty and opportunity, defences of aristocratic privilege and derogations from democratic right. The law schools have been slowly winning their way along the lines of better training for the bar, but the progress is very slow, and the pressure for brief and easy ways to get a license to practice is continuous. Only last year the Massachusetts Legislature, by statute, reduced the requirement of school attendance for admission to the bar to two years of evening high school, following upon an agitation carried on in support of the principle, "Let every man have his chance." One of our States, and a very great State indeed, with a very high average of general cultivation, permits any one of good moral character to practice law. Correspondence schools of law flourish, proceeding upon the idea that a man can become a lawyer incidentally by reading law books in spare hours as he goes along with his ordinary occupation. The constant pressure of democratic assertion of individual rights is always towards reducing the difficulty of bar examinations. One consequence is the excess of lawyers that I have mentioned. Another consequence is that the efficiency of our courts is reduced, their rate of progress retarded, the expense increased, their procedure muddled and involved by an appreciable proportion of untrained and incompetent practitioners; by badly drawn, confused, obscure papers difficult to understand; by interlocutory proceedings which never ought to have been taken, and proceedings rightly taken in the wrong way and inadequately presented; by vague and haphazard ideas as to rights and remedies; by ignorance of the principles upon which our law of evidence is based; by ignorance of what has been decided and what is open to argument; by waste of time with worthless evidence and useless dispute in the trial of causes; by

superfluous motions and arguments and appeals; and by the correction of errors caused by the blunders of attorneys and counsel. In many jurisdictions there is a considerable percentage of the bar whose practice causes the courts double time and labor because the practitioner is not properly trained to use the machinery furnished by the public for the protection of his clients. In the meantime other litigation waits and the public pays the expense.

Such an advertisement and the facts which led to it do not help the interests of Massachusetts or her people. We believe this matter should be left to the regulation of the justices of the Supreme Judicial Court in future, with the assistance of the Bar Examiners, and that they should be trusted to regulate it in the interest of the public as they are trusted with all their other important duties.

We think that all citizens of the Commonwealth, whether graduates of any educational institution or not, should stand on the same footing so far as examinations are concerned. We believe that Massachusetts should require a high standard for admission to the bar. Massachusetts cannot afford to lag behind other States in the requirements of intellectual training for the bar. The longer this step is delayed the worse will be the conditions of practice. We cannot expect any progress in the administration of justice without the aid of a trained and educated bar. A stream cannot rise higher than its source, and in the long run the standard of the courts cannot be above that of the bar.

We recommend that the present statutory restrictions upon the action of the Supreme Judicial Court in this matter be removed, and submit a draft of an act in Appendix A.

6. Conclusion.

Many other suggestions as to details of practice have been made to the Commission, and there are doubtless many not called to our attention which on further study might be found capable of improvement. Such matters would gradually be called to the attention of a judicial council such as we suggest, if it is created. Some of these matters were dealt with in the recent Constitutional Convention.

For the convenience of the Legislature we annex a partial

list of previous reports and articles relative to the development of the courts, and an extract from an article written in 1858 by Mr. Justice Horace Gray on the power of the Legislature relative to the courts.

In conclusion we have not thought it advisable to limit ourselves to recommendations, but we have treated of some matters in which we thought it wiser to make no recommendations in a way which we hope will be found suggestive for the future. There can be no finality in our report, for our work has merely succeeded the work of previous commissions, and must in time be continued by others who come after us, either by the method we have recommended or in some other way. As the substantive law continues to grow with the changing times and customs, so the practice and procedure which is necessary to the enforcement of its rights and duties likewise develop. In the realization, therefore, that such development is really a healthy sign for our judicial system, and that the last word cannot be said while it continues, we submit the result of our labors.

HENRY N. SHELDON.
GEORGE R. NUTTER.
ADDISON L. GREEN.

FRANK W. GRINNELL,
Secretary.

APPENDICES

APPENDIX A.

DRAFTS OF LEGISLATION RECOMMENDED.

1. AN ACT TO EXTEND THE CONCURRENT JURISDICTION OF THE SUPERIOR COURT.

Be it enacted, etc., as follows:

SECTION 1. The superior court shall have original jurisdiction, concurrently with the supreme judicial court, of all proceedings relating to habeas corpus, quo warranto and informations in the nature of a quo warranto, mandamus (except in the case of the issue of a writ of mandamus to a court or judge), and also all matters relating to the dissolution of corporations, and all cases and matters of equity of which the supreme judicial court now has exclusive original jurisdiction, other than cases arising under the statutes relating to insolvency of which general superintendence and jurisdiction are given to it by those statutes, or arising under sections seventy-seven and seventy-eight of chapter sixty-three of the General Laws relating to the reimbursement of certain taxes, or under section five of chapter twenty-five of the General Laws relating to the department of public utilities.

SECTION 2. Questions of law arising in any proceedings of which jurisdiction is hereby vested in the superior court may be reserved and reported to the supreme judicial court for the consideration of the full court, in the same manner and subject to the same provisions as are or may be applicable to suits in equity.

SECTION 3. This act shall take effect on the day of nineteen hundred and .

Explanatory Note to Section 1.

Section 1 is drawn to carry out the plan of enlarging the concurrent jurisdiction of the Superior Court so as to include such of the jurisdiction of the Supreme Judicial Court as is in the nature of original jurisdiction but not to extend it to the field of the probate courts. Accordingly proceedings in the nature of appeals and subjects over which the Supreme Judicial Court and the probate courts now have concurrent jurisdiction are not affected by this provision. Accordingly neither prohibition nor certiorari is included, as they are in the nature of appeals, as is also mandamus to a court or judge, and, to some extent, the general superintendence in

insolvency under General Laws, chapter 216, section 17 (Lancaster *v.* Choate, 5 Allen, 530, 535). This is true also of the other exceptions noted in the act. The exclusive equity jurisdiction of the Supreme Judicial Court is defined in General Laws, chapter 214, section 2.

Explanatory Note to Section 2.

In habeus corpus and other proceedings questions may now be reserved by the Supreme Judicial Court by General Laws, chapter 211, section 6 (King's case, 161 Mass. 46; Employers Assurance Corporation *v.* Merrill, 155 Mass. 404, 412) substantially as in equity, and similar power ought to be given to the court to which such cases are transferred. Power is given to the Superior Court to reserve questions in Equity by General Laws, chapter 214, sections 30 and 31 (Nashua & Lowell Railroad Corporation's Case, 169 Mass. p. 164). The power to report questions in actions at law is different (General Laws, chapter 231, section 111), and is not changed by this bill.

2. An Act to extend the Power of Transfer of the Supreme Judicial Court.

Be it enacted, etc., as follows:

The supreme judicial court or a justice thereof may transfer for partial or final disposition in the superior court or in the probate court, respectively, any cause within the concurrent jurisdiction of said courts, respectively, and the supreme judicial court, and may direct any cause within such concurrent jurisdiction commenced in either of said courts to be transferred to the supreme judicial court in whole or in part for further action or directions, and in case of partial transfer may issue such orders or directions in regard to the part of such cause not so transferred, as justice may require.

3. An Act relative to the Justices of the Supreme Judicial Court and the Superior Court.

Be it enacted, etc., as follows:

Section 1. Every justice of the supreme judicial court shall have all the jurisdiction, powers and authority of a justice of the superior court and shall be competent to sit and act in that court as fully as if he were a justice thereof.

Section 2. A justice of the superior court may at the request of the chief justice of the supreme judicial court sit as a single justice in the supreme judicial court, and during the continuance of such request shall have and exercise all the powers and duties which a justice of the supreme judicial court has and may exercise as a single justice.

Section 3. When a justice of either court sits in the other

court as above provided, the fact of his holding court, and, in case of such a sitting under section two, the fact of the request of the chief justice of the supreme judicial court shall be entered upon the general records of the court, but need not be stated in the record of any case heard by him.

Explanatory Note.

As explained in the report, arrangements for such sittings as are provided for by this act would be made as a result of conference between the chief justices of the two courts.

4. An Act to provide for a Judicial Council.

Be it enacted, etc., as follows:

Section 1. There shall be a judicial council of not less than five and not more than nine members for the continuous study of the organization, rules and methods of procedure and practice of the judicial system of the commonwealth, the work accomplished, and the results produced by that system and its various parts.

This council shall be composed of the chief justice of the supreme judicial court or some other member or former member of that court assigned by him; the chief justice of the superior court or some other member or former member of that court assigned by him; one other judge from any other court of the commonwealth, and two members of the bar, to be selected and assigned to this work by the chief justice of the supreme judicial court. The chief justice of the supreme judicial court may, in his discretion, appoint two or four additional members of the council but, in case of such additional appointments, they shall be made equally from the bench and from the bar. The assignment shall be for such periods as the assigning power shall determine.

Section 2. The council shall report annually to the governor upon the work of the various branches of the judicial system. The council may also from time to time submit such suggestions as it may deem advisable for the consideration of the justices of the various courts in regard to rules of practice and procedure.

The clerks of the various courts and other officials shall make to the council such reports on such matters and in such form periodically or from time to time as the council may prescribe.

Section 3. The council may give public hearings and shall have power to administer oaths and to require the attendance

of witnesses and the production of books and documents. A witness who gives false testimony, or fails to appear when duly summoned, shall be subject to the same penalties to which a witness before a court is subject.

SECTION 4. No member of said council shall receive any compensation for his services, but the council and the several members thereof shall be allowed from the state treasury such expenses for clerical and other services, travel and incidentals as the governor and council shall approve. There shall be an executive secretary of the judicial council to be appointed by the said council who shall serve during its pleasure and who shall receive a salary, the amount of which shall be determined by the judicial council from time to time subject to the approval of the governor and council.

5. AN ACT TO AVOID THE DELAY AND EXPENSE OF DOUBLE TRIALS IN CIVIL ACTIONS, AND TO PROVIDE FOR APPELLATE DIVISIONS OF THE POLICE, DISTRICT AND MUNICIPAL COURTS TO HEAR APPEALS ON QUESTIONS OF LAW, AND TO PROVIDE FOR AN ADMINISTRATIVE COMMITTEE OF THE DISTRICT COURTS.

Be it enacted, etc., as follows:

SECTION 1. If after this act takes effect a party elects to bring, in a district court any action or other civil proceeding, except summary process, which he might have begun in the superior court, he shall be deemed to have waived a trial by jury and his right to appeal to the superior court, unless the said action or other civil proceeding is removed to the superior court, as hereinafter provided, in which case the plaintiff shall have the same right to claim a trial by jury as if the action or civil proceeding had been originally brought in the superior court: *provided, however,* that if a declaration in set-off is filed in such action, the plaintiff may of right remove the cause and claim a jury trial, in the manner and upon the terms set out in section two of this act, within the time allowed him for filing an answer to such declaration in set-off.

SECTION 2. No other party to such action shall be entitled to an appeal. In lieu thereof, any such party may, within two days after the time allowed for entering his appearance, file in said court a claim of trial by jury, and an affidavit by his counsel of record, if any, and if none, the affidavit of such party, that in his opinion there is an issue of fact requiring trial in the cause, and that such trial is in good faith intended, together

with the sum of three dollars for the entry of the cause in the superior court [and security for costs as provided by sections one hundred and four, one hundred and six and one hundred and seven of chapter two hundred and thirty-one of the General Laws]. The clerk shall forthwith transmit the papers and entry fee [and any such security] in the cause to the clerk of the superior court for the same county, and the same shall proceed as though then originally entered there, but may be marked for trial upon the lists of causes advanced for speedy trial by jury.

SECTION 3. In any action brought by or against two or more persons in which separate judgments are authorized by sections two and four of chapter two hundred and thirty-one of the General Laws, the party seeking removal may specify in his claim of jury trial the parties as to whom such trial is claimed, in which case the cause shall be removed as to such parties only as are specified in such claim, and the court in which the action was brought shall retain jurisdiction as to the remainder. In such case the clerk shall transmit copies of the papers in the cause to the clerk of the superior court in lieu of the originals.

SECTION 4. The court in which the action was brought may, upon cause shown and after notice to all adverse parties, permit such removal to the superior court, upon the terms above specified, at any time prior to final judgment.

SECTION 5. There shall be an appellate division of each district court for the rehearing of matters of law arising in civil causes therein. Any party to a cause brought after this act takes effect, who is aggrieved by any ruling on a matter of law by a single justice, may, as of right, have the ruling reported for determination by the appellate division when the cause is otherwise ripe for judgment, or sooner by consent of the justice hearing the same. The request for such a report shall be filed with the clerk within two days after notice of the ruling, and when the objection is to the admission or exclusion of evidence, the claim for a report shall also be made known at the time of the ruling. If the appellate division shall decide that there has been no prejudicial error in the ruling complained of, it shall dismiss the report, and may impose double costs in the action if it finds the objection to such ruling to be frivolous or intended for delay. If the appellate division shall decide that there has been prejudicial error in the ruling complained of, it may reverse, vacate or modify the same, order a new trial in whole or in part, and exercise any of the powers relating to civil actions

tried without a jury given to the supreme judicial court by sections one hundred and twenty-four, one hundred and twenty-five, one hundred and twenty-six and one hundred and thirty-two of chapter two hundred and thirty-one of the General Laws; and the provisions of said sections shall apply to actions brought in any district court, so far as the same may be applicable thereto. If the party claiming such report shall not duly prosecute the same, by preparing the necessary papers or otherwise, the appellate division may order the cause to proceed as though no such claim had been made, and may in like manner impose costs.

SECTION 6. Such appellate division in any court other than the district courts in the county of Suffolk shall be holden by other justices of district courts, not exceeding three in number out of five justices assigned to the performance of such duty by the chief justice of the supreme judicial court, but no justice shall sit upon the review of his own rulings. Such assignment may be made for such period of time as such chief justice may deem advisable. Such chief justice shall assign five justices of courts within the counties of Essex and Middlesex to act in the appellate divisions of courts within those counties, shall assign five justices of courts within the counties of Norfolk, Plymouth, Bristol, Barnstable, Dukes and Nantucket to act in the appellate divisions of courts within those counties, and shall assign five justices of courts within the counties of Worcester, Franklin, Hampshire, Hampden and Berkshire to act in the appellate divisions of courts within those counties. In each of the foregoing three districts one of the justices so assigned shall be designated by the chief justice of the supreme judicial court as presiding justice, who shall from time to time designate those of the appellate justices who shall act on appeals in any court and direct the times and places of sittings. Two justices shall constitute a quorum to decide all matters in an appellate division.

A justice acting in the appellate division of a court other than the court of which he is justice shall be allowed reasonable compensation for his services and travelling expenses, to be awarded and paid by the county in which the court in which he so acts is located upon his certificate approved by the county commissioners at the same rate as if he had acted as master appointed by the supreme judicial court.

SECTION 7. An appeal shall lie from the final decision of the appellate division to the supreme judicial court. Claim thereof shall be filed in the office of the clerk of the district court within

five days after notice of the decision of the appellate division. The necessary papers shall, at the expense of the party appealing, unless the court shall order the expense to be borne by some other party, be prepared by the clerk, who may require the estimated expense thereof to be paid in advance. The appeal shall be transmitted to and entered in the docket of the supreme judicial court within ten days after notice to the appealing party that the papers are ready for transmission. The expense of such copies and transmission, and the entry fee in the supreme judicial court, shall be taxed in the bill of costs of the prevailing party, if he has paid it. The provisions of section twenty-five of chapter two hundred and sixty-one of the General Laws shall apply to such appealed cases. If the appellant fails to perfect duly the appeal, or to enter the same in the supreme judicial court, the appellate division may, upon application of an adverse party, and after notice to all persons interested, order that the appeal be vacated and the decision appealed from affirmed.

SECTION 8. The justices or a majority of them of all the district courts except the district courts in the county of Suffolk shall make uniform rules for the preparation and submission of reports and the allowance of reports which a justice shall disallow as not conformable to the facts, or shall fail to allow by reason of physical or mental disability, death or resignation and for the granting of new trials.

SECTION 9. The appellate division of the municipal court of the city of Boston shall be the appellate division of all the district courts in the county of Suffolk, and the justices of all of said district courts are hereby made eligible to sit upon such appellate division from time to time by assignment of the chief justice of the municipal court of the city of Boston, and the practice in regard to reports in civil causes in all of said district courts shall be in accordance with the rules made or to be made in the municipal court of the city of Boston. The clerks of said courts shall forthwith, upon the making of a report, transmit to the clerk of the municipal court of the city of Boston all the papers in the cause in which the report to the appellate division is requested, together with the report, and the clerk of the municipal court of the city of Boston shall place the cause forthwith upon the docket of the appellate division. Upon the determination by such appellate division and the expiration of the time of appeal therefrom to the supreme judicial

court, or in case of such appeal upon the determination by the supreme judicial court of the questions open for consideration upon the report, the papers, together with the rescript, shall be returned to the clerk of the municipal court of the city of Boston, and by him transmitted to the court in which the cause originated for further proceedings. Except as provided in this section and in section twelve nothing in this act shall apply to the municipal court of the city of Boston or the justices thereof.

SECTION 10. There shall be an administrative committee of district courts, which shall consist of the three presiding justices for the time being assigned by the chief justice of the supreme judicial court to act in the appellate divisions as herein provided. The committee shall be authorized to visit any district court, other than the municipal court of the city of Boston, as a committee or by sub-committee, to recommend uniform practices, forms of blanks and records, and to superintend the keeping of records by clerks.

SECTION 11. The members of this committee shall be allowed the necessary expenses incurred in the performance of their duties, subject to the approval of the governor and council, and shall receive such compensation for their services actually performed in the work of such committee as the governor and council shall approve, to be paid from the treasury of the commonwealth.

SECTION 12. To promote co-ordination in the work of the courts, the administrative committee may call a conference of any or all of the justices of the district courts, including the municipal court of the city of Boston, or of other officials connected with such courts, and the traveling expenses of such justices or officials for attending any such conferences shall be paid as the other expenses of the respective courts are paid.

SECTION 13. The administrative committee herein provided for shall make a report annually, or oftener when called for, to the judicial council upon the work, or any part thereof, of the district courts, or any of them, other than the district courts of the county of Suffolk.

SECTION 14. All acts and parts of acts inconsistent herewith are hereby repealed.

SECTION 15. This act shall take effect on the first day of September, in the year nineteen hundred and twenty-one.

Explanatory Note.

The words enclosed in brackets in section 2 may be omitted if no removal bond is to be required.

6. An Act relative to the Civil Jurisdiction of District Courts.

Be it enacted, etc., as follows:

Section 1. Section nineteen of chapter two hundred and eighteen of the General Laws is hereby amended by striking out the whole of said section and substituting therefor the following: — *Section 19.* District courts shall have original jurisdiction concurrent with the superior court of actions of contract, tort or replevin, and also of actions of summary process under chapter two hundred and thirty-nine, and proceedings under section forty-one of chapter two hundred and thirty-one. If a defendant in an action, except summary process, commenced in a district court, or a person in his behalf, within the time allowed for answer files in said court an affidavit of his belief that the matter involved in the suit exceeds one thousand dollars in value, or, in the municipal court of the city of Boston, two thousand dollars, that his interest alone or with the interest of any other defendant having a joint or common interest with him exceeds said value, that he has a substantial defence, which shall be specified in such affidavit, and that he intends to bring the cause to a hearing, together with the sum of three dollars for the entry of the cause in the superior court, the cause with the papers therein shall, upon his request and at his expense, be forthwith removed to the superior court for the county in which the action is brought, and it shall there proceed as if originally commenced therein.

Section 2. This act shall take effect on

Explanatory Note.

The provision for removal is similar to that which has existed since 1883 for removing cases in equity from the Superior Court to the Supreme Judicial Court (see General Laws, chapter 214, section 32).

7. An Act to avoid Conflicts of Jurisdiction over Certain Problems of Domestic Relations.

Be it enacted, etc., as follows:

Section 1. After a prosecution against a husband for desertion or nonsupport has been commenced in a district court, the district court shall have jurisdiction upon petition of the wife, or of some person on behalf of the minor children, if any, to decree the right of the wife to separate support and freedom to convey and deal with her property real and personal as provided in

sections thirty and thirty-one of chapter two hundred and nine of the General Laws, and to make such order as to the maintenance and custody of the children of such parents as a probate court might make, and in the exercise of such jurisdiction the district courts shall have all the powers and authorities of the probate courts. The justices or a majority of them of all the district courts except the municipal court of the city of Boston shall make uniform rules applicable to said courts, and the justices of the municipal court of the city of Boston or a majority of them shall make rules applicable to that court regulating the procedure and practice in the exercise of such jurisdiction. Petitions brought in the district courts under such jurisdiction shall stand upon the same footing as regards appeals as civil causes in actions of contract in the court in which such cause is pending, in which no jury trial is claimed.

SECTION 2. In a prosecution for desertion or nonsupport against a husband under chapter two hundred and seventy-three of the General Laws, a decree or judgment of a probate court, or of a district court as herein provided, in a proceeding in which the husband appeared or was personally served with process, establishing the right of the wife to live apart, or of her freedom to convey and deal with her property, or the right to the custody of children, shall be sufficient evidence of such rights.

SECTION 3. No civil proceedings in any court shall be held to be a bar to a prosecution for desertion or nonsupport under chapter two hundred and seventy-three of the General Laws.

SECTION 4. Upon the filing of a petition for separate support or for freedom to convey and deal with property or custody of children under the preceding sections, in a district court in which a proceeding for desertion or nonsupport is pending, the clerk of said district court shall forthwith send notice in writing thereof, giving the names and addresses of the persons involved and the nature of the proceeding, to the probate court of the county in which said cause is pending, and the register of probate shall cause the names and addresses, the nature of the proceedings and the court in which it is pending to be entered upon his records for convenient reference.

SECTION 5. This act shall take effect on the first day of in the year nineteen hundred and .

8. AN ACT TO SIMPLIFY AND RENDER LESS EXPENSIVE THE PROCEDURE RELATIVE TO EQUITABLE PROCESS AFTER JUDGMENT FOR NECESSARIES OR FOR LABOR PERFORMED.

Be it enacted, etc., as follows:

SECTION 1. Section one of chapter two hundred and twenty-five of the General Laws is hereby amended by striking out, in the ninth and tenth lines thereof, the words "an examination into his circumstances should not be made and", and inserting in the tenth line thereof, after the word "decree", the words: — should not be, — and by adding after the word "day", in the thirteenth line thereof, the words: — or in such manner with such allowance of time as may be provided by rule under this act, — so as to read: — *Section 1.* Upon the application of a judgment creditor, with affidavit by him or a person in his behalf that the judgment is founded upon a claim for necessaries of life furnished to the judgment debtor or his family, or for work or labor performed by the creditor for the debtor, the district court of the judicial district where the debtor lives, or, if he does not live within such district, a district court having a judicial district within the county and adjoining or near the town where the debtor lives, shall issue a notice to the debtor to appear at a time and place named therein to show cause why a decree should not be entered that he pay such judgment in full or by instalments. Said notice shall be served by delivering to the debtor, or by leaving at his last and usual place of abode, a copy thereof, at least seven days before the return day or in such manner with such allowance of time as may be provided by rule under this act. If it appears that said notice was not duly served, the court may continue the proceedings and issue a new notice.

SECTION 2. Section four of said chapter is hereby amended by inserting after the word "equity", in the second line thereof, the words: — or as may be provided by rule under this act, — so as to read: — *Section 4.* Decrees under this chapter may be enforced by proceedings for contempt as in a court of equity or as may be provided by rule under this act; but no more than fourteen days' imprisonment shall be imposed for any one such contempt. The debtor may be released by order of the court upon payment of the judgment and costs, or upon giving a bond to the creditor, with one or more sureties approved by the court, conditioned to comply with existing or subsequent decrees of the

court; or, after seven days' imprisonment, he may be released by order of the court, upon filing with the court his personal bond, conditioned thenceforth to comply with decrees of the court. If the debtor is released upon his personal bond, and fails to comply with said decrees within sixty days after his release or shows good cause for non-compliance, he may again be cited to appear and be punished as for a further contempt.

SECTION 3. Said chapter is hereby further amended by adding at the end thereof the following: — *Section 12.* The justices or a majority of them of all the district courts, except the municipal court of the city of Boston, shall make uniform rules applicable to said courts, and the justices of the municipal court of the city of Boston or a majority of them shall make rules applicable to that court for the purpose of further simplifying and avoiding expense incidental to the procedure provided for in this chapter. Such rules may provide for service of notices or other process by registered mail and for the time to be allowed thereon. If the debtor does not appear upon the notice to show cause under section one, or upon process for contempt thus served under section four of this chapter, the court may order his arrest, or in its discretion may order further service by an officer qualified to serve process under this chapter before ordering such arrest.

SECTION 4. This act shall take effect on the day of in the year nineteen hundred and .

9. AN ACT RELATIVE TO SPECIAL JUSTICES OF DISTRICT COURTS.

Be it enacted, etc., as follows:

Section seventeen of chapter two hundred and eighteen is hereby amended by inserting after the word "justice", in the first line thereof, the words: — special justice, and by striking out all after the word "therein" in the fourth line thereof, — so as to read: — *Section 17.* A justice, special justice, clerk or assistant clerk of a district court shall not be retained or employed as attorney in an action, complaint or proceeding pending in his court, or which had been examined or tried therein.

10. An Act to abolish the Name "Police" Court.

Be it enacted, etc., as follows:

Section 1. Section one of chapter two hundred and eighteen of the General Laws is hereby amended by striking out the name "police" wherever it appears as part of the name of any court, and substituting therefor the word "district", so that the police court of Lee shall be known hereafter as the district court of Lee; the police court of Williamstown as the district court of Williamstown; the police court of Newburyport as the district court of Newburyport; the police court of Chicopee as the district court of Chicopee; the police court of Holyoke as the district court of Holyoke; the police court of Springfield as the district court of Springfield; the police court of Lowell as the district court of Lowell; the police court of Marlborough as the district court of Marlborough; the police court of Newton as the district court of Newton; the police court of Somerville as the district court of Somerville; the police court of Brockton as the district court of Brockton; the police court of Chelsea as the district court of Chelsea; and the police court of Fitchburg as the district court of Fitchburg.

Section 2. The change of name herein provided for shall not affect the validity of any proceedings commenced in any of said courts under the name "police" court prior to the day of nineteen hundred and twenty-one.

11. An Act relative to the Sittings of the Full Bench of the Supreme Judicial Court.

Be it enacted, etc., as follows:

Section 1. Chapter two hundred and eleven of the General Laws is hereby amended by striking out the last sentence of section twelve and the whole of section thirteen thereof and substituting therefor the following: — *Section 13.* All cases and matters in any county that may be required to be heard and determined in the supreme judicial court by the full court shall be heard at such times and at such places as the court shall from time to time appoint, with a view to the dispatch of business and the interest of the public. All such cases and matters shall be entered as heretofore provided unless the court orders otherwise, and the court may make such rules or orders, general or other-

wise, for the entry and hearing of such cases from time to time as the dispatch of business and the interest of the public may require.

SECTION 2. This act shall take effect on the day of nineteen hundred and .

12. AN ACT TO AUTHORIZE JURIES TO RECEIVE THE ASSISTANCE OF THE COURT.

Be it enacted, etc., as follows:

Section eighty-one of chapter two hundred and thirty-one of the General Laws is hereby repealed.

13. AN ACT RELATING TO APPRAISEMENTS IN THE PROBATE COURTS.

Be it enacted, etc., as follows:

Every inventory filed in the probate court after this act takes effect, by an executor, administrator, trustee, guardian, conservator, or receiver of an absentee, shall specify the values of the property comprised in it, and shall be sworn by him to be a true inventory of the real and personal estate of the testator, intestate, trust, ward, or absentee, which has come to his possession or knowledge, with the actual market values of the particulars thereof ascertained by him to the best of his knowledge, information, and belief, and the appraisement of the property by appraisers or an appraiser shall not be required, but the court may at any time order such appraisement if for any reason it appears to be desirable.

Explanatory Note.

This is the kind of inventory and valuation required by the Tax Commissioner when an inventory is filed with him under General Laws, chapter 65, section 22, and there is no occasion for any other kind of inventory. The ordinary appraisement by appraisers in the probate courts is a burden and an expense to the estate. It does not settle the value of anything for any purpose, for, if the fiduciary sells for more or less than the appraised value, he is charged or allowed for the difference (General Laws, chapter 206, section 5). The values for the purpose of legacy and succession tax are determined by the Tax Commissioner, subject to appeal, independently of any previous appraisement (General Laws, chapter 65, sections 25 and 26). For the purpose of an inventory, the values can be ascertained by the executor or other fiduciary, as well as by appraisers, and without expense. The appraisement is often made the subject of a considerable charge by the appraisers, who are the only persons that derive any benefit from it, and estates ought to be relieved of this expense. Provision is made at the end of the section for an appraisement if a case should arise in which it is desirable.

14. An Act relative to Appeals from the Probate Courts in Certain Cases.

Be it enacted, etc., as follows:

Section twenty-four of chapter two hundred and fifteen of the General Laws is hereby amended by adding at the end thereof the words: — and in all cases of guardianship where the custody of children has been granted, — so as to read: — *Section 24.* The preceding section shall apply to orders or decrees of probate courts in proceedings under sections thirty-two and thirty-seven of chapter two hundred and nine, and in all cases of guardianship where the custody of children has been granted.

15. An Act relative to the Criminal Jurisdiction of the Municipal Court of the City of Boston.

Be it enacted, etc., as follows:

Section 1. When a defendant arraigned in the municipal court of the city of Boston pleads "not guilty" to a charge within the jurisdiction of such court, the court or clerk shall then address a question to him to the following effect: "Do you wish to be tried by a jury, or do you consent to being tried in this court without a jury and without any appeal for a jury trial?" with such explanatory statements as the court may think desirable for the information of the person accused in regard to a jury trial in the superior court, and trial without jury in the court in which he is arraigned.

If such defendant elects to have a trial by jury his case shall be transferred to the superior court for the county of Suffolk. The papers, or if less than all defendants who are complained of jointly elect trial by jury, certified copies thereof, and any security deposited on a recognizance therein by a defendant who elects trial by jury, shall be transmitted forthwith to the clerk of the superior court for criminal business in the county of Suffolk, and if any such defendant is in custody he shall be ordered to recognize in such sum and with such surety or sureties as the court may require, with condition to appear in said superior court on the next return day and as further provided in General Laws, chapter two hundred and seventy-eight, section eighteen, and in default thereof he shall be committed to the gaol in said county. If the defendant consents to be tried in

the municipal court of the city of Boston such consent shall be entered upon the record and shall be a waiver of a right to jury trial. There shall be no appeal from any decision of said court except as hereinafter provided. Nothing herein shall affect the power of said municipal court under section thirty of chapter two hundred and eighteen of the General Laws.

SECTION 2. A defendant thus tried in the municipal court of the city of Boston who is aggrieved by any ruling on a matter of law by a justice may as of right have the ruling reported for determination by the appellate division of said court, provided for by section one hundred and eight of chapter two hundred and thirty-one of the General Laws. The claim for such a report of a ruling shall be made known at the time of the ruling. The justice making the ruling shall not sit upon the review thereof. If the appellate division shall find material error, it shall correct the same by such order as justice may require, otherwise it shall affirm the action of the single justice. A justice by whom a case is heard may without being requested so to do report after conviction any question of law therein for the consideration of the appellate division. The municipal court of the city of Boston shall establish sittings of the appellate division of such frequency as to deal as expeditiously as possible with such reports, and shall by rule direct the form and time of making such reports and provide for the allowance of reports which a single justice shall disallow as not conformable to the facts, or shall fail to allow by reason of physical or mental disability, death or resignation.

SECTION 3. The defendant may appeal from the final decision of the appellate division to the supreme judicial court for the commonwealth. Claim thereof shall be filed in the office of the clerk of said municipal court within three days after the announcement of the decision to the defendant in open court. Copies and papers relative to the appeal shall be prepared by the clerk of said municipal court, and shall thereupon be transmitted to and entered in the law docket of the supreme judicial court for the commonwealth as soon as may be after such appeal has been claimed, and duly made matter of record in said municipal court. The entry thereof shall not transfer the case but only the question to be determined. The clerk of said municipal court shall forthwith, upon the transmission of the papers in such appeal, give notice thereof to the district attorney of Suffolk county. If the defendant neglects to enter his appeal

in the supreme judicial court, or neglects to take the necessary measures for the hearing of the cause in the supreme judicial court, the said appellate division may upon the application of the district attorney, and after notice, order that the appeal be dismissed and the decision appealed from be affirmed. Upon the return of the rescript of the supreme judicial court to the municipal court of the city of Boston said municipal court shall dispose of the case accordingly.

SECTION 4. Any defendant complaining of a sentence presently effective may upon claim thereof made at the time of order for its execution, which claim may be oral and shall be noted by the clerk, have the same summarily and speedily revised by three justices of said court, to be designated from time to time by the chief justice. The justice imposing the sentence may be included in said number. Said revising justices may make any disposition of the case which a single justice might have made.

SECTION 5. Sentences imposed shall stand suspended pending review of a ruling or revision of sentence pursuant to this act, and the imposition of such sentence shall not discharge bail or security. Such cases shall be continued from time to time to a day certain. The condition of a recognizance of a person either with or without surety or security to appear to answer to a charge against him in the municipal court of the city of Boston shall be so framed as to bind him personally to appear as well in the superior court from time to time in case of removal as herein provided, and in either court to abide final sentence, order or decree and not depart without leave.

16. AN ACT TO PROVIDE FOR A WEEKLY RETURN DAY IN THE SUPERIOR COURT FOR CRIMINAL CASES.

Be it enacted, etc., as follows:

Section twenty-two of chapter two hundred and twelve of the General Laws is hereby amended by striking out, in the first line thereof, the words "The first Monday of every month", and substituting therefor the words: — Every Monday, — and by striking out, in the ninth line thereof, the words "said first", and substituting the word: — any, — so as to read: — *Section 22.* Every Monday shall be a return day for the entry of appeals in criminal cases from district courts and trial justices, and of suits upon recognizances and bonds in such cases. Such appeals

shall be entered on the return day next after the appeal is taken. Such suits may be made returnable at the election of the district attorney at any such return day within three months after the date of the writ. Trials by jury of such suits shall take place at criminal sittings, and such suits shall be filed, docketed and recorded as criminal cases. If any Monday is a legal holiday, such entry shall be made on the day following.

17. An Act relative to Demurrers at Law and in Equity.

Be it enacted, etc., as follows:

Section 1. Section thirteen of chapter two hundred and fourteen of the General Laws is amended by striking out, in the third and fourth lines, the words "but a demurrer shall be accompanied by a certificate that it is not intended for delay",— so as to read:— *Section 13.* A defence to a suit in equity shall be made by demurrer, plea or answer. A demurrer or plea need not contain a protestation or concluding prayer. An answer, except to a bill for discovery only, or a plea, shall not be made under oath or under seal, and it need not contain any saving of exceptions to the bill, or a prayer to be dismissed or for costs. Answers to interrogatories in a bill for discovery shall be made within such time as the court orders, and questions arising thereon shall be determined by the rules applicable to bills for discovery.

Section 2. Section eighteen of chapter two hundred and thirty-one of the General Laws is hereby amended by striking out at the end thereof, in lines seventeen to twenty, the words "the attorney, if any, shall certify upon the demurrer that he is of the opinion that there is such probable ground in law therefor as to make it a fit subject for judicial inquiry, and that it is not intended merely for delay."

Explanatory Note.

The requirement of a certificate that a demurrer is not intended for delay serves no useful purpose. The signature of counsel implies an opinion that it is a proper subject for the consideration of the court (Story Eq. Pl., sect. 461).

18. AN ACT TO PROVIDE FOR THE ORAL EXAMINATION OF PARTIES BEFORE TRIAL.

Be it enacted, etc., as follows:

SECTION 1. Any party after the entry of a writ or the filing of a bill or petition may examine orally any other party, in the city or town within the commonwealth of the residence or usual place of business of the party to be examined, for the discovery of facts and documents admissible in evidence at the trial of the case. The word "party" in this act shall be deemed to include parties intervening or otherwise admitted after the beginning of the suit. Such examination may be used at the trial by the party taking the same or by any other party on paying the cost of taking the same unless the party examined is present at the trial of the case. Nothing herein shall be held to prevent the use of such examination as a declaration or admission of a party, if material, whether or not the party examined is present at the trial, or the use of such examination in connection with cross-examination of such party. Sections sixty-five, sixty-six and sixty-seven of chapter two hundred and thirty-one of the General Laws shall apply under this act.

SECTION 2. In order to make such examination any party may apply to a justice of the peace, notary public, or a special commissioner, who shall issue a notice to the party to be examined to appear before said justice, notary or commissioner at the time and place appointed for such examination. Sections twenty-seven and twenty-eight of chapter two hundred and thirty-three of the General Laws shall apply to notices of such examinations and the service thereof, except that notice shall also be given to all parties to the proceedings or to their attorneys of record, so that they may attend the examination.

SECTION 3. The party examined shall be sworn or affirmed, and his examination shall be taken in the same manner and subject to the same rules as if taken before a court, except that no witness shall be compelled to answer a question or produce a document if it would tend to incriminate him, or to disclose his title to any property, the title whereof is not material to the trial of the action in the course of which he is examined, or to disclose the names of the witnesses by whom he proposes to prove his own case. The court shall at all times have full control of the examination.

SECTION 4. The party requesting the examination shall be

allowed first to examine on all points material to the cause in which the examination is made. The party examined or his attorney may then examine in like manner, after which any party may examine further.

SECTION 5. The examination shall be taken by a stenographer appointed by the justice, notary or commissioner on the request of either party and at his expense. Said stenographer shall be sworn by the justice, notary or commissioner to transcribe faithfully the testimony, and his transcript shall be certified by the justice, notary or commissioner. In case such request is not made the deposition shall be written by the justice, notary or commissioner or by a disinterested person, in the presence and under the direction of the justice, notary or commissioner. The examination or the stenographer's transcript thereof shall be carefully read to or by the party examined and then subscribed by him.

SECTION 6. The examination shall be delivered by the justice, notary or commissioner to the court, before which the cause is pending, or shall be enclosed and sealed by him and directed to it, and shall remain sealed until opened by it. Copies of the deposition, however, may be furnished by the justice, notary or commissioner to any party.

SECTION 7. Nothing in this act contained shall prevent either party calling and examining verbally at the trial of the action any party in the same manner as though his testimony had not been taken in writing.

SECTION 8. If a party after due notice fails without reasonable cause to attend and submit himself to examination under this act, the court may make and enter such order, judgment or decree as justice requires, and the court shall have at all times full control of the examination, and may make all proper orders relating thereto.

SECTION 9. No one without leave of court shall both examine any other party orally under this act and interrogate him in writing under General Laws, chapter two hundred and thirty-one, sections sixty-one to sixty-seven, and no party shall be required to attend and submit himself to examination more than once in the same case except by order of court.

Explanatory Note.

This act is drawn to apply only to residents of the Commonwealth. It may be well to extend it later to nonresidents, but they may now be examined by deposition under General Laws, chapter 233, sections 39 to 44.

19. An Act relative to the Discovery of Documents.

Be it enacted, etc., as follows:

Section 1. Any party after the entry of a writ or the filing of a bill or petition in the various courts to which sections sixty-one to sixty-eight of chapter two hundred and thirty-one of the General Laws apply, may by filing a demand therefor require an adverse party to make discovery on oath of all documents admissible in evidence at the trial of the case which are or have been in his possession or power. Notice of such filing with a copy of the demand shall be sent by the party making the demand to the party upon whom it is made or his attorney of record. Within the time after notice allowed for filing answers to written interrogatories filed for discovery in the various courts above mentioned, the party upon whom the demand is made shall file a schedule under oath of documents so demanded which are or have been in his possession or power and, if not still in his possession or power, state what has become of them and in whose possession or power they are. Such affidavit shall specify which, if any, of the documents therein mentioned he objects to produce, and thereafter the court may make such order with regard to the time and methods of production and the right of the demanding party to make copies, as justice may require. The term "documents" shall not be construed to include written statements of parties or other persons made or obtained in preparation of the case.

Section 2. If the party upon whom a demand is made fails to file the schedule above provided for, or to produce for inspection or copying any documents herein specified as ordered, the court may make and enter such order, judgment, or decree as justice requires. Sections sixty-one to sixty-eight of chapter two hundred and thirty-one of the General Laws shall apply to proceedings hereunder so far as applicable.

Section 3. This act shall take effect on the day of nineteen hundred and .

20. An Act to provide for Weekly Return Days in the Supreme Judicial Court and the Superior Court.

Be it enacted, etc., as follows:

Section twenty-four of chapter two hundred and twenty-three of the General Laws is hereby amended by striking out, in the first line thereof, the words "The first Monday of every month",

and substituting therefor the words: — Every Monday, — and by striking out, in the fifth line thereof, the words "said first", and substituting therefor the word: — any, — and by inserting after the word "citations", in the sixth line thereof, the words: — then returnable, — so as to read: — *Section 24.* Every Monday shall be a return day in every county for writs, processes, notices to appear and citations in all actions, suits and other proceedings in the supreme judicial court and the superior court, and for the entry in the superior court of actions removed or appealed from district courts. If any Monday is a legal holiday, such writs, processes, notices and citations then returnable shall be returned and such suits entered on the day following. Such writs, processes, notices and citations may be made returnable, at the election of the party who takes out the same, at any return day within three months after the date thereof; but said courts may make them returnable at other times. If they issue out of the supreme judicial court for Dukes or Nantucket county, they shall be returnable in Bristol county.

21. An Act to establish Procedure for Declaratory Judgments.

Be it enacted, etc., as follows:

Section three of chapter two hundred and fourteen of the General Laws is hereby amended by adding at the end thereof the following: — (11) Equitable actions to obtain declaratory relief, in which it shall be no objection to the maintenance of such an action that no consequential relief is sought or can be granted, if at appears that substantial doubt exists as to the alleged rights or duties of parties, that an actual controversy has arisen as to such rights or duties which cannot be settled in any pending suit, and that either public or private interests will be materially promoted by a declaration of right or duty in advance of any actual or threatened invasion of right or default in duty. The judgment rendered in such an action shall bind all parties thereto and be conclusive as to the rights and duties involved.

22. An Act relative to Costs in Civil Actions.

Be it enacted, etc., as follows:

Section 1. Section twenty-three of chapter two hundred and sixty-one of the General Laws is hereby amended by striking out the whole thereof and substituting therefor the following: —

Section 23. There shall be allowed in a civil action in the supreme judicial court or in the superior court, in addition to other disbursements allowed by law, the following costs: —

For entry fee, three dollars.

For travel, reasonable expenses actually incurred for necessary attendance at court to be certified by the party and determined by the court.

If the defendant was arrested on mesne process, and the plaintiff shall recover more than twenty dollars, exclusive of costs, the plaintiff shall have taxed in his costs against the defendant the costs paid by the plaintiff upon and after the arrest and all lawful charges paid by him for the defendant's support in jail. If the defendant was arrested on mesne process, and final judgment is rendered in his favor, he shall have taxed in his costs against the plaintiff all costs paid by the defendant on account of the arrest.

SECTION 2. Section twenty-five of said chapter is hereby amended by striking out, in the first and second lines thereof, the words "not exceeding twenty-five dollars", — so as to read: — *Section 25.* The prevailing party shall be allowed such sum as the court considers reasonable for expenses actually incurred in printing the briefs which may be required for the argument of the case at the law sitting of the supreme judicial court.

SECTION 3. Section twenty-six of said chapter is hereby amended by striking out the whole thereof and substituting therefor the following: — *Section 26.* There shall be allowed, in a civil action in a district court, in addition to other disbursements allowed by law, the following costs: —

To the plaintiff or complainant —

For a writ and declaration, petition or complaint, one dollar.

For travel, the expenses allowed by section twenty-three.

If the defendant was arrested on mesne process, and the plaintiff shall recover more than twenty dollars, exclusive of costs, the costs paid by him upon and after the arrest, and all lawful charges paid by him for the defendant's support in jail.

To the defendant —

For travel, the expenses allowed by section twenty-three.

If the defendant was arrested on mesne process, and final judgment is rendered in his favor, he shall have taxed in his costs against the plaintiff all costs paid by the defendant on account of the arrest.

SECTION 4. Section twenty-seven of said chapter is hereby

amended by striking out the whole thereof and substituting therefor the following: — *Section 27.* There shall be allowed to a trustee or an adverse claimant in an action by the trustee process in a district court, in addition to other disbursements allowed by law, such costs as the court may determine.

SECTION 5. Section twenty-eight of said chapter is hereby repealed.

SECTION 6. Section sixty-eight of chapter two hundred and forty-six of the General Laws is hereby amended by striking out the whole thereof and substituting therefor the following: — *Section 68.* A person summoned as trustee in the supreme judicial or superior court, who appears and answers pursuant to this chapter, or who is summoned in a district court, shall be allowed such costs as the court may determine. If there has been a trial between the plaintiff and the alleged trustee upon an issue of fact the court may award costs to either party.

Explanatory Note.

The difference in the wording of section 68 of chapter 246 as applied to the Supreme Judicial Court or the Superior Court and the district courts appears in the present statute, and has not been changed in the above draft.

23. AN ACT RELATIVE TO BONDS IN THE PROBATE COURTS.

Be it enacted, etc., as follows:

SECTION 1. When an executor, administrator, trustee, guardian or other fiduciary is not required to give sureties or a surety on his bond in the probate court, he shall not be required to give any bond unless the court shall in any case require such bond, but, whether he is required to give any such bond or surety or not, he shall be subject independently thereof to the same obligations, duties and liabilities as are specified in the condition of the bond required by law in the like case at the time of his appointment when a bond with sureties or a surety is required, and shall be deemed upon his appointment to contract for the performance of all such obligations, duties and liabilities; and an action to enforce any such liability may be brought against him by any person in his own name who in the like circumstances, if a bond with sureties had been given, might have brought an action on the bond for his own benefit, and such an action may also be brought against him in the name of the judge of the probate court with the like authority and in the like manner and subject to the like provisions as an action might have been brought upon such a bond.

SECTION 2. When letters testamentary or administration shall be granted to an executor or administrator without giving any bond, the time limited by any statute for bringing an action against him or doing any other act by reference to the time of his giving bond for the performance of his trust shall run from the date of such letters testamentary or administration.

Explanatory Note.

There is no use in a person's giving his own bond (without sureties) to do what he is already required by law to do. The only occasion for a bond is when sureties are required. The liability of the fiduciary himself can always be enforced against him directly and more simply than by an action on a bond, in which judgment would first be given for the penalty, and then there would be an inquiry to ascertain the amount due in equity, and in which, if there were further breaches, further like inquiries would be had (General Laws, chapter 235, sections 9 to 12). Under General Laws, chapter 206, section 4, the liability will generally be enforced by the probate court in the proceeding by which it was established, but, if in any case an action on a bond would be of any use, this section allows an action without a bond. For the cases in which persons can sue on an executor's bond for their own benefit, see General Laws, chapter 205, sections 20 to 22, or, in other cases by leave of court, section 23. As to section 2 see General Laws, chapter 197, sections 1, 9 as to bringing actions, etc., and chapter 195, section 1, as to giving notice.

24. AN ACT RELATIVE TO VENUE IN SUITS ON ASSIGNED CLAIMS.

Be it enacted, etc., as follows:

Section one of chapter two hundred and twenty-three of the General Laws is hereby amended by striking out the period after the word "business", in the fourth line thereof, substituting therefor a comma, and adding thereafter the following clause: — provided that except in actions upon negotiable instruments if the plaintiff is an assignee of the cause of action, it shall be brought only in a county in which it might have been brought by the assignor thereof, — so as to read: — *Section 1.* A transitory action shall, except as otherwise provided, if any one of the parties thereto lives in the commonwealth, be brought in the county in which one of them lives or has his usual place of business, provided that except in actions upon negotiable instruments if the plaintiff is an assignee of the cause of action, it shall be brought only in a county in which it might have been brought by the assignor thereof. If brought in any other county, unless removed under section fifteen, the writ shall abate and the defendant shall be allowed double costs. If neither party lives in the commonwealth, the action may be brought in any county.

25. An Act relative to Suits commenced by Trustee Process in District Courts.

Be it enacted, etc., as follows:

Whenever an action is commenced by trustee process in a district court in the district in which the party named in the writ as trustee lives or has his usual place of business, which could not be brought in that district except because of the residence or place of business of the trustee, the court may on motion of any party thereto transfer such action for trial and final disposition to any other district court in which the action might have been commenced had there been no trustee named in the writ.

26. An Act relative to Admission to the Bar.

Be it enacted, etc., as follows:

Section thirty-six of chapter two hundred and twenty-one of the General Laws is hereby amended by striking out, in lines four to nine thereof, the words "provided that any applicant for admission to the bar who is a graduate of a college or who has complied with the entrance requirements of a college, or who has fulfilled for two years the requirements of a day or evening high school or of a school of equal grade, shall not be required to take any examination as to his general education", — so as to read: — *Section 36.* Said board may, subject to the approval of the supreme judicial court, make rules with reference to examinations for admission to the bar and the qualifications of applicants therefor, and determine the time and place of such examinations, and conduct the same. The expenses of said board, as certified by its chairman and approved by a justice of the supreme judicial court, shall be paid by the commonwealth, together with such compensation to each member as the justices of the supreme judicial court approve, but said expenses and compensation shall not be in excess of the amounts paid to the commonwealth under the following section.

Appendix B.

EXTRACT FROM AN ARTICLE IN 1858 BY HORACE GRAY, ESQ., ON "THE POWER OF THE LEGISLATURE TO CREATE AND ABOLISH COURTS OF JUSTICE."

In 1858, at a time when the powers of the Legislature in regard to the abolition of courts and the creation of new courts was under discussion, Horace Gray, Esq., who was then Reporter of Decisions, and who subsequently became chief justice of Massachusetts and later an associate justice of the Supreme Court of the United States, wrote an article which was published anonymously in the "Law Reporter" for June, 1858 (Vol. 21, page 65), entitled "The Power of the Legislature to create and abolish Courts of Justice." An autographed copy of this article is in the Boston Public Library.

After treating of the history of the Supreme Judicial Court and showing the way in which it was established as a permanent constitutional court, he deals with the legislative power over the other courts of the State, and gives a brief account of the statutory changes in regard to these other courts prior to 1858. As this historical study is not generally known, the following extracts are quoted for convenient reference: —

The Power of the Legislature to create and abolish Courts of Justice.

The inferior Courts of Judicature are placed by the Constitution on a very different footing from the Supreme Judicial Court. Their judges, it is true, are appointed by the Governor, and hold during good behavior, except Justices of the peace. But they are none of them, other than Judges of Probate, specifically mentioned in the Constitution, except in those clauses which declare the incompatibility of offices. . . .

On the other hand, the Constitution contains the following provisions, copied almost word for word from the Province Charter: —

> The General Court shall forever have full power and authority to erect and constitute judicatories and courts of record or other courts, to be held in the name of the Commonwealth, (under the Charter, in the name of the King,) for the hearing, trying and determining of all manner of crimes, offences, pleas, processes,

plaints, actions, matters, causes and things whatsoever, arising or happening within the Commonwealth, (under the Charter, within the Province,) or between or concerning persons inhabiting or residing or brought within the same; whether the same be criminal or civil, or whether the said crimes be capital or not capital, and whether the said pleas be real, personal or mixed. Constitution of Massachusetts, c. 1, sec. 1, art. 3, Anc. Chart. 32.

And further, full power and authority are hereby given and granted to the said General Court, from time to time, to make, ordain and establish all manner of wholesome and reasonable orders, laws, statutes and ordinances, directions and instructions, either with penalties or without, so as the same be not repugnant or contrary to this Constitution, (by the Province Charter, "to the laws of this our realm of England,") as they shall judge to be for the good and welfare of this Commonwealth, (by the Charter, of the Province,) and for the government and ordering thereof, and of the subjects (by the Charter, "inhabitants,") of the same, and for the necessary support and defence of the government thereof; and to name and settle annually, or provide by fixed laws for the naming and settling (The clause as to fixed laws was not in the Charter) all civil officers within the said Commonwealth, (Province,) the election and constitution of whom are not hereafter in this form of government otherwise provided for, (in the Charter, not reserved to the King, or to the Governor,) and to set forth the several duties, powers and limits of the several civil and military officers of this Commonwealth, (in the Charter, of all appointed by the General Court.) Constitution of Massachusetts, c. 1, sec. 1, art. 4. Anc. Chart. 32, 33.

And it has always been the practice of the Legislature of the Commonwealth, at their discretion, to create new judicatories, other than the Supreme Judicial Court, to transfer jurisdiction from one to another, in whole or in part, and to abolish any inferior court and substitute another in its place, or permit its powers and duties to revest in the tribunal to which they belonged before the former court was created. The action of the Legislature with regard to the two principal inferior courts of the Commonwealth, the Court of Common Pleas, and the Court of Sessions, both mentioned in the Constitution, affords sufficient examples of the exercise of this power.

In 1782, a Court of Common Pleas was established in each county, with civil jurisdiction only, to which, in 1804, all the criminal jurisdiction of the Court of Sessions was added. The county Courts of Common Pleas, each of which consisted of four, and afterwards of three judges, were superseded, in 1811, by Circuit Courts of Common Pleas, of only three judges each, though each circuit consisted of several counties. In 1814, a Boston Court of Common Pleas was established, vested with all the jurisdiction, and the judge of which was to receive all the fees, of the former Courts of Common Pleas in the county of Suffolk. And in 1821, all former acts concerning Courts of Common Pleas were repealed, and a Court of Common Pleas for the Commonwealth established, to consist of four judges; which court, with an occasional increase in the number of judges, has continued to this day, except in Suffolk where it has recently been superseded in its turn by the present Superior Court of that county. Sts. 1782, c. 11; 1803, c. 155; 1811, c. 33; 1813, c. 173; 1820, c. 79; 1855, c. 449.

The changes in the Court of Sessions were still more frequent. Justices of these courts were first provided for by acts of 1807 and 1808, the courts having been previously held by the Justices of the Peace of the county. In 1809, those acts were repealed, and all the powers and duties of the Court of Sessions transferred to the Court of Common Pleas. The Courts of Sessions were revived in 1811; again abolished in all the counties except Suffolk, Nantucket and Dukes County, in 1814, and re-established in 1819; abolished in Suffolk in 1821; part of their jurisdiction transferred to Commissioners of Highways, in 1826; and finally abolished throughout the Commonwealth, together with the Commissioners of Highways, in 1827, and the duties of both transferred to County Commissioners, by whom, under various modes of appointment and election, they have since been performed. Sts. 1807, cc. 11, 57; 1809, c. 18; 1811, c. 81; 1813, c. 197; 1818, c. 120; 1821, c. 109; 1825, c. 171; 1827, c. 77; 1835, c. 152; 1854, c. 77; Rev. Sts., c. 14, sections 16 *et seq.*

These changes, though many of them necessarily took away all the powers, jurisdiction, duties and compensation of the justices of the courts, thus abolished, have been generally acquiesced in, and repeatedly recognized as legal by the Supreme Judicial Court. Wales *v.* Belcher, 3 Pick. 510. Taft *v.* Adams, 3 Gray 130. Dearborn *v.* Ames, Suffolk March term, 1857. . . .

This question of the power of the Legislature has been much discussed in connection with the recent Massachusetts statute of March 26th, 1858, (St. 1858, c. 93,) entitled "An Act to change the jurisdiction in matters of Probate and Insolvency," by which "the office of the Judge of Probate of wills and for granting letters of administration, and the office of Judge of the Court of Insolvency, as the same are now established by law, in each of the respective counties of the Commonwealth, are abolished;" and all their jurisdiction and authority are transferred to a "Judge of Probate and Insolvency," to be appointed in each county.

In the Province Charter of 1691 the probate jurisdiction, which was derived from the civil law, was separated from the common law jurisdiction, by authorizing the Governor and Council to "do, execute or perform all that is necessary for the probate of wills, and granting of administrations for, touching or concerning any interests or estate which any person or persons shall have within our said province or territory." Anc. Chart. 32. In the exercise of the authority so conferred, the Governor appointed, as his deputies or surrogates, Judges of Probate in each county, who had not even the seal and forms of a judicial tribunal, but from whom an appeal lay to the Governor and Council. An act, passed by the Provincial Legislature, to establish county courts of probate, was negatived by the King; and no statute, establishing such courts, or, providing for the appointment of judges or registers of probate, existed until after the adoption of the Constitution. Parsons, C.J., in Wales *v.* Willard, 2 Mass. 124, Shaw, C.J., in Peters *v.* Peters, 8 Cush. 541.

Only twenty years before the adoption of the Constitution, Governor

Pownall, in a communication laid before "a Court of Probate held by the Governor, with the Council or Assistants, at the council chamber in Boston, on the 9th day of February, A.D. 1760," said: —

> It is a civil law court. This idea will not only point out what ought to be the rules or practice of this court; but from this alone can its present method of administration be accounted for. No common law court has a power of substitution; no law of the Province established the court of the county judges of probate, though many laws recognize them as constituted. This power of substitution or delegation is incidental to every civil law judge, and this incidental right is specially mentioned in the charter by the words *all that is necessary thereto*. The wisdom therefore of our predecessors has, from this idea, understanding the power they were vested with by this grant of a civil law jurisdiction, delegated or substituted judges of probates in the several counties who are thereby inferior civil law courts for distinct peculiars, and subsist by a delegation of power to judge in the first instance, from whom lies an appeal to the Governor with the Council or Assistants as the Superior Court of the Province for such matters.

And pursuant to the recommendation of the Governor, the Council then for the first time passed orders for the appointment of a register to the Supreme Court of Probate; for the recording of probate matters in a separate book from the other doings of the Governor and Council; establishing regular terms and a seal for the Supreme Court of Probate; and regulating appeals from the Judges of Probate. But although the Governor "observed that there still remained to be considered these two points, namely: 1st, What rules or orders are to be observed by this court in its juridical capacity? 2d, In what method the exercise of its jurisdiction may be carried into execution?" and these matters were referred to the same committee which had reported the other orders, it does not appear by the records of the Supreme Court of Probate (which are preserved in the office of the clerk of the Supreme Judicial Court of the County of Suffolk, and from which the above is taken) that any further orders were passed relating to the practice in probate proceedings.

At the time of the adoption of the Constitution of Massachusetts, therefore, the original jurisdiction in matters of probate was exercised by mere deputies of the Governor and Council holding by no judicial tenure; and the appellate jurisdiction was vested, not in any court of judicature, but in the Governor and Council. And these facts should be borne in mind in interpreting the clauses of the Constitution in which Judges of Probate are mentioned, and especially in determining whether the Constitution invests their courts with a sacredness which belongs to no other tribunal except the Supreme Court.

The Constitution does, indeed, ordain that "the Judges of Probate of wills, and for granting letters of administration, shall hold their courts at such place or places, on fixed days, as the convenience of the people shall require." c. 3, art. 4. But the avowed purpose of this provision is not to establish a particular set of judges, but merely (in the spirit of the Province law of 1719, Anc. Chart., 427,) to secure to the people of the

Commonwealth easy and certain access to the only courts under whose jurisdiction the family and creditors of every citizen of any property must some time come. And, as if to preclude the supposition that this security for the convenience of the people could exempt these judges in any degree from legislative control, it is immediately added: "And the Legislature shall from time to time hereafter appoint such times and places; until which appointments, the said courts shall be holden at the times and places which the respective judges shall direct."

Then comes the clause that "all appeals from the Judges of Probate shall be heard and determined by the Governor and Council, until the Legislature shall, by law, make other provision;" c. 3, art. 5. This provision, also, was not new, but merely continued in force that part of the Province Chapter, until the Legislature should have opportunity to consider and act upon it. It left the appellate probate jurisdiction, where it found it, in the Governor and Council, thus making the Supreme Court of Probate to consist of officers elected annually by the people; and submitted the question of the erection of a new Supreme Court of Probate entirely to the discretion of the Legislature. Surely, this clause carries with it no very strong implication that the inferior courts of probate are beyond the reach of the Legislature.

Courts of Probate were not, in fact, established under the Constitution, until 1784, when the Legislature passed an act establishing a Probate Court in each county of the Commonwealth, defining their jurisdiction, and making the Supreme Judicial Court the Supreme Court of Probate, St. 1783, c. 46.

The only other articles of the Constitution, which mention Judges of Probate, are those relating to the incompatibility of certain offices, c. 6, sec. 2; amendments, art. 8. But as these mention in like manner the Court of Common Pleas, and the Court of Sessions, they can hardly, after what we have seen of the legislation with regard to those courts, add much weight to the position of Judges of Probate.

The validity of that part of the act of 1858 which abolishes the office of Judge of Insolvency is unquestionable; for those judges who are not even named in the Constitution. And any doubt remaining as to the entire constitutionality of the act, as applied both to Judges of Probate and to Judges of Insolvency, must be dispelled by a consideration of the precedent of the Court of Insolvency itself.

The nineteenth article of amendment of the Constitution of Massachusetts, which was adopted by the people on the 23d of May, 1855, declared: "The Legislature shall prescribe, by general law, for the election of Commissioners of Insolvency by the people of the several counties, for such term of office as the Legislature shall prescribe." And, in obedience to this direction, the Legislature, on the 16th of May, 1856, provided for the election of Commissioners of Insolvency by the people of each county, to hold office for three years. St. 1856, c. 173. By another act, passed only three weeks later, the same Legislature transferred all the juris-

diction, power and authority of Commissioners of Insolvency to Judges of Courts of Insolvency, thereby first established, which judges were to be appointed by the Governor, and hold during good behavior. St. 1856, c. 284. This act was approved by the Governor, and judges appointed accordingly. And the Supreme Judicial Court, in the case of Dearborn *v.* Ames, argued and determined in Suffolk, March term, 1857, as well as in an opinion given to the Senate about the same time, held that this act was constitutional and valid.

That amendment of the Constitution not only mentioned the officers in question by a name which of itself implied, necessarily, and to the understanding of the public, the jurisdiction over proceedings in insolvency, but in terms declared that "Commissioners of Insolvency" should be elected by the people; and the Legislature had provided for such election, and fixed their term of office. Yet an act was passed by the Legislature, signed by the Governor, and held valid by the Supreme Judicial Court, which not only put an end to all the powers and jurisdiction, and consequently to all the compensation, of Commissioners of Insolvency, but was open to the additional serious objection of conferring those powers and jurisdiction, with a more certain compensation for their exercise, on officers not elected by the people, nor responsible directly to them. And the principal reason assigned by the Supreme Court, for not allowing to that amendment of the Constitution the effect of perpetuating the office of Commissioner of Insolvency; or even of securing the continuance of its power and jurisdiction, being partly judicial in their nature, in officers elected in the same manner; was that such a construction would be inconsistent with the general powers granted to the Legislature to establish judicatories and set forth the powers and duties of officers.

The theories of the Constitutions of the United States and of this Commonwealth, on this subject, may be briefly stated thus: The Supreme Court, vested with the ultimate power of determining all questions of law, including the very delicate duty of even setting aside an act of the Legislature when contrary to the Constitution, is a necessary part of the government of any country which has a written constitution, limiting the lawmaking power, and creating distinct judiciary and legislative departments; and must, therefore, be established by the Constitution itself, and put beyond legislative control. But what inferior courts and magistrates may be requisite to administer and interpret the laws, cannot well be foreseen, and must be left to the discretion of the Legislature to judge, as circumstances may demand. And, although it is well that the judges of the inferior courts also should hold their offices during good behavior, so long as the public advantage may require the continuance of their offices, an irrevocable establishment of their offices is not of at all the same importance as those of the supreme judges; and, if made, would effectually prevent any complete amendment of the judiciary system, even when it should become clear that the established organization did not meet the wants of the public.

Both these Constitutions, therefore, recognize the power to organize and re-organize inferior courts as an essential and inalienable attribute of the Legislature. For this purpose "the General Court shall *forever* have full power and authority to erect and constitute judicatories and courts of record." And Congress is not only vested, in the same clause which confers upon it other general legislative powers, with that "to constitute tribunals inferior to the Supreme Court," but the inferior courts, in whom part of the judicial power is to vest, are "such as the Congress may, *from time to time*, order and establish."

The practical rule, which governs the whole subject, is that every court may be abolished by the power which established it, but not by any lower power. *Cujus est instituere, ejus est abrogare.* The Supreme Court, therefore, established by the people in their Constitution, as a necessary part of the frame of government, can be reached only by an amendment to the Constitution. But all the inferior courts, being but the creatures of the Legislature, may be abolished by the same power which created them.

Note.

The provision for the election of commissioners of insolvency in the Nineteenth Amendment referred to in the foregoing extract was repealed in 1894 by the Thirty-sixth Amendment to the Constitution.

Appendix C.

PARTIAL LIST OF REPORTS OF PREVIOUS COMMISSIONS AND COMMITTEES, ARTICLES, ETC., RELATING TO THE DEVELOPMENT OF MASSACHUSETTS COURTS.

1798.

Report of Legislative Committee on Judicial System (reprinted in II Massachusetts Law Quarterly, pp. 478, 479, referring to a report of a "Revising Committee" in 1788).

1803-04.

Correspondence between Theodore Sedgwick and Harrison Gray Otis, and Letter of the Justices to Governor Strong in 1804 (reprinted II Massachusetts Law Quarterly, pp. 498–506).

1808.

Report of Legislative Committee (Joseph Story, chairman) recommending Equity Jurisdiction.

1840.

Governor Morton's Inaugural Address.

1844.

Report of Commissioners on the Penal Code (not adopted).

1851.

Report of Commission on the Practice Act (reprinted in Hall's "Massachusetts Practice").

Report of Joint Special Committee on this Report (Senate Document No. 74, 1851).

1853.

Supplementary Report of the Same Commission on Equity Practice (Senate Document No. 67, 1853).

1859.

Report of Joint Legislative Committee recommending the Creation of the Superior Court, etc. (House Document No. 120, 1859).

1876.

Report of Commission on the Expediency of Revising the Judicial System (Public Document No. 32, 1877).

1886.

Report of Joint Legislative Committee on Judicial System (Senate Document No. 10, 1887).

1892.

Report of Special Committee on Expediency of Revising the Judicial System (Senate Document No. 31, 1893).

1893.

Majority and Minority Reports of Commission on Land Registration (House Document No. 250, 1894).

1897.

Report of Alfred Hemenway, Esq., Commissioner, of the Draft of the Act establishing the Land Court.

1898.

Report of Commission on Simplification of Criminal Pleading (Senate Document No. 234, 1899).

1904.

Report of Special Committee on Compensation of State and County Officials (House Document No. 175, 1904).

1909.

Report of Commission on the Causes of Delay in the Administration of Justice (House Document No. 1050, 1910).

1910.

Report of the Legislative Committee of the Massachusetts Bar Association on the Above Report (I Massachusetts Bar Association Reports, pp. 93–113).

Discussion of both of the Above Reports at the Annual Meeting of the Massachusetts Bar Association (I Massachusetts Bar Association Reports, pp. 41–92).

1912.

Report of the Committee on Compensation for Industrial Accidents.

Report of the Special Commission on the Inferior Courts of Suffolk County (House Document No. 1638, 1912).

1914.

Report of the Commission on Pensions (House Document No. 2450, 1914).

1916.

Report of the Special Commission to consider abolishing the Trial Justice System (Senate Document No. 347, 1917).

Report of the Municipal Court of the City of Boston to the City Council.

1918.

Report of the Special Committee of the Executive Council on the Standardization of Salaries in the State Service (House, No. 1175, 1918, Part II, p. 67 *et seq.*).

1919.

Report of Supervisor of Administration (House Document No. 1451, 1919).

Discussion Relating to Masters and Auditors at Meeting of Massachusetts Bar Association (V Massachusetts Law Quarterly, pp. 42–62).

1920.

First Report of the Present Judicature Commission (House, No. 597, 1920) recommending Procedure for Collection of Small Claims.

MISCELLANEOUS ARTICLES, ETC.

Washburn's Judicial History of Massachusetts.

Chief Justice Shaw's Description of Practice between 1780 and 1800 (reprinted in II Massachusetts Law Quarterly, pp. 475–477).

Pamphlet by Erastus Worthington about 1810 relative to Equity Jurisdiction.

An Account of the First "Municipal Court of the Town of Boston" (II Law Reporter No. VIII, pp. 225–228).

Judicial History in Massachusetts Prior to 1780 by the late Albert Mason, Chief Justice of the Superior Court (reprinted II Massachusetts Law Quarterly, p. 82).

Constitutional History of the Supreme Judicial Court of Massachusetts from the Revolution to 1813 (II Massachusetts Law Quarterly No. 5 for May, 1917, and see, further, III Massachusetts Law Quarterly, p. 332, and VI Massachusetts Law Quarterly I).

The Power of the Legislature to create and abolish Courts of Justice, by Horace Gray, Esq. (21 Law Reporter, p. 65).

For extract from this article see Appendix B, above.

The Failure of the Appeal System, by H. T. Lummus (1909), containing a historical study of the district courts.

Reports of the Committee on Law and Procedure of the Association of Justices of Police, District and Municipal Courts.

Various Reports of the Boston Finance Commission.

The History of Chancery Jurisdiction in Massachusetts, by Edwin H. Woodruff, 5 Law Quarterly Review, p. 370. (See also an article by Reinsch in "Select Essays in Anglo-American Legal History," Vol. I, p. 367.)

Introduction to Aldrich on Equity, containing a Chronological Account of the Statutes relating to Equity Jurisdiction.

AMENDMENTS

TO

RULES

OF THE

DISTRICT COURTS

OF

MASSACHUSETTS

(Except the Municipal Court of the City of Boston)

1921

INCLUDING THE RULES FOR

SMALL CLAIMS PROCEDURE

With Notes by the Committee on Law and Procedure of the Association of Justices of District Courts,

Justice HENRY T. LUMMUS of Lynn
Justice FRANK A. MILLIKEN of New Bedford
Justice CHARLES L. HIBBARD of Pittsfield
Justice FREDERICK P. CABOT of Boston
Chief Justice WILFRED BOLSTER of Boston

NOTICE

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General Laws, Chapter 218

SECTION 43. The justices, or a majority of them, of all the district courts, except the municipal court of the city of Boston, shall from time to time make and promulgate uniform rules regulating the time for the entry of writs, processes and appearances, the filing of answers and for holding trials in civil actions, and the practice and manner of conducting business in cases which are not expressly provided for by law, including juvenile proceedings and those relating to wayward delinquent and neglected children.

Small Claims Procedure

SECTION 21. The justices or a majority of them of all the district courts, except the municipal court of the city of Boston, shall make uniform rules applicable to said courts, and the justices of the municipal court of the city of Boston shall make rules applicable to that court, providing for a simple, informal and inexpensive procedure, hereinafter called the procedure, for the determination, according to the rules of substantive law, of claims in the nature of contract or tort, other than slander and libel, in which the plaintiff does not claim as debt or damages more than thirty-five dollars, and for a review of judgments upon such claims when justice so requires. The procedure shall not be exclusive, but shall be alternative to the formal procedure for causes begun by writ.

SECTION 22. The procedure shall include the beginning of actions with an entry fee of one dollar but without writ, and without requirement, except by special order of court, of other pleading than a statement to the clerk or an assistant clerk, who shall reduce the same to concise written form in a docket kept for the purpose. The procedure shall include notice by registered mail instead of the mode of service heretofore required, and shall include provisions for early hearing. The

procedure may include the modification of any or all rules of pleading and practice, anything contained in other chapters, sections or acts notwithstanding, and may include a stay of the entry of judgment or of the issue of execution. The rules for the procedure may provide for the elimination of any or all fees and costs, and that costs shall be in the discretion of the court. In causes begun under the procedure, the court may on application for cause shown issue writs of attachment of property or person as in causes begun by writ.

SECTION 23. A plaintiff beginning a cause under the procedure shall be deemed to have waived a trial by jury and any right of appeal to the superior court and any right to a report to an appellate division; but if said cause shall be removed to the superior court as hereinafter provided, the plaintiff shall have the same right to claim a trial by jury as if the cause had been begun in the superior court. No other party to a cause under the procedure shall be entitled to an appeal or report. In lieu thereof, any such party may, prior to the day upon which he is notified to appear, file in the court where the cause is pending a claim of trial by jury, and his affidavit that there are questions of fact in the cause requiring trial, with specifications thereof, and that such trial is intended in good faith, together with the sum of three dollars for the entry of the cause in the superior court; and thereupon the clerk shall forthwith transmit such original papers or attested copies thereof as the rules for the procedure may provide, and the superior court may try the cause as transmitted or may require pleadings as in a cause begun by writ, but the cause may be marked for trial on the list of causes advanced for speedy trial by jury. Section one hundred and five of chapter two hundred and thirty-one shall apply in all district courts in causes begun under the procedure.

SECTION 24. The court may, in its discretion, transfer a cause begun under the procedure to the regular civil docket

for formal hearing and determination as though it had been begun by writ, and may impose terms upon such transfer.

SECTION 25. In any cause begun by writ which might have been begun under the procedure, the rules for the procedure may provide, or the court may by special order direct, that the costs to be recovered by the plaintiff, if he prevails shall be eliminated in whole or in part.

NOTE. The reference in §23 to G. L. c. 231, §105, relates to the right of a party claiming removal, in an action by or against a number of parties, in which separate judgments are authorized by G. L. c. 231, §§2, 4, to specify in his claim of jury trial the parties as to whom such trial is claimed, whereby the case may be removed as to such parties but the district court will retain jurisdiction as to the remainder. There is no express provision for removal by one of a number of purely joint defendants; probably, as in appeals (G. L. c. 231, §97), the whole case is removed.

January 3, 1921.

The undersigned, being a majority of the justices of all the district courts of Massachusetts, as defined in G. L. c. 4, §7, except the municipal court of the city of Boston, acting under the authority of G. L. c. 218, §§21, 22, 23, 24, 25 and 43, do hereby make and promulgate the following uniform rules applicable to such district courts, to take effect from and after January 31, 1921.

Name	Justice of the
Frederick C. Swift	First district court of Barnstable
Walter Welsh	Second district court of Barnstable
Charles L. Hibbard	District court of central Berkshire
Carlton T. Phelps	District court of northern Berkshire
Fred R. Shaw	Fourth district court of Berkshire
Bart Bossidy	Police court of Lee
Frederick E. Austin	First district court of Bristol
Frank A. Milliken	Third district court of Bristol
Charles C. Hagerty	Fourth district court of Bristol
Edmund G. Eldridge	District court of Dukes County
George B. Sears	First district court of Essex
Charles I. Pettingell	Second district court of Essex
George H. W. Hayes	Third district court of Essex
John J. Winn	Central district court of northern Essex
Henry T. Lummus	District court of southern Essex
Jeremiah J. Mahoney	District court of Lawrence
Thomas C. Simpson	Police court of Newburyport
Benjamin G. Hall	District court of Peabody
Elisha S. Hall	District court of eastern Franklin
John P. Kirby	Police court of Chicopee
Wallace R. Heady	Police court of Springfield
John B. O'Donnell	District court of Hampshire
Henry C. Davis	District court of eastern Hampshire
Prescott Keyes	District court of central Middlesex
Warren H. Atwood	First district court of northern Middlesex
Charles M. Bruce	First district court of eastern Middlesex
Samuel P. Abbott	Second district court of eastern Middlesex
Charles Almy	Third district court of eastern Middlesex
Edward F. Johnson	Fourth district court of eastern Middlesex

Edward W. Blodgett	First district court of southern Middlesex
Thomas J. Enright	Police court of Lowell
Henry C. Mulligan	District court of Natick
William F. Bacon	Police court of Newton
L. Roger Wentworth	Police court of Somerville
Reginald T. Fitz-Randolph	District court of Nantucket
Clifford B. Sanborn	District court of northern Norfolk
Albert E. Avery	District court of East Norfolk
Oscar E. Marden	District court of southern Norfolk
Orestes T. Doe	District court of western Norfolk
Charles F. Perkins	Municipal court of Brookline
George W. Kelley	Second district court of Plymouth
Nathan Washburn	Fourth district court of Plymouth
Charles S. Sullivan	Municipal court of the Charlestown district
Joseph R. Churchill	Municipal court of the Dorchester district
Joseph H. Barnes	East Boston district court
Albert F. Hayden	Municipal court of the Roxbury district
John Perrins	Municipal court of the West Roxbury district
Samuel Utley	Central district of Worcester
George R. Warfield	First district court of northern Worcester
Jonathan Smith	Second district court of eastern Worcester
Henry J. Clarke	First district court of southern Worcester
Francis N. Thayer	Second district court of southern Worcester
Clifford A. Cook	Third district court of southern Worcester
Henry E. Cottle	District court of western Worcester
Thomas F. Gallagher	Police court of Fitchburg
Franklin Freeman	District court of Leominster
Frank B. Spalter	District court of Winchendon

Rules for Small Claims Procedure

RULE 1. The plaintiff, or his attorney, shall state the nature and amount of his claim to the clerk, who, after due inquiry, shall cause the claim to be reduced to writing in the docket, in concise, untechnical form, and to be signed by the plaintiff or attorney. The signature shall be deemed the beginning of the action. If the claim involves more than three items, the plaintiff or attorney shall deliver to the clerk a fair list of such items, numbered consecutively. If the clerk deems the statement of claim insufficient to make a prima facie case, the court, at the request of the plaintiff or attorney, shall decide whether such claim shall be received.

NOTE TO RULE 1.

(a) For the meaning of "attorney" and "docket," see Rule 12.

(b) In using the printed docket cards prepared by the Committee on Law and Procedure, the main card for the record of the case should be numbered in the upper right corner. Where there are two defendants, a second printed docket card bearing the same number with "A" added should be used to record the name and addresses of, and the notice to, the second defendant. A third defendant may be

treated in a similar way. Two plaintiffs with a common place of business may be recorded on the main docket card; a second card "A" may be used for other plaintiffs.

(c) The amount claimed should be stated in unliquidated claims as well as others, for jurisdictional purposes, although the court must assess damages even after default.

(d) The list of items delivered to the clerk has several uses. Whether incorporated into the claim, and therefore into the docket and record, by reference, or not, it serves to show to the defendant, upon inquiry of the clerk, the details of the claim against him; and it assists the court, at the hearing, in arriving at the facts. It may furnish the means of amending the claim, if amendment should be needed.

Where the list of items is short, the clerk may reproduce it in substance in the claim written on the docket card, thus avoiding the permanent preservation of a separate list; to file nothing permanently except the docket card, is an ideal to be attained when practicable. Longer lists of items, when it is deemed necessary to have them become part of the claim, may be incorporated therein by reference, under Rule 12, as, e.g. "See list of items filed."

(e) The claim should be reduced to writing in the docket in a form sufficient to apprise the defendant of its nature, to furnish the basis of an intelligible judgment, to preclude any further suit upon that claim, and, when practicable, to show whether the claim is within the class of claims for labor or necessaries upon which equitable process may be based. More than that is unnecessary.

The following are suggestions for stating claims: —
"Claim. Defendant owes plaintiff $27.83 for groceries and household goods, sold him between Oct. 16, 1920 and Dec. 28,

1920, inclusive." [If the list of items is to be made a part of the claim, add, "See list of items filed."]
"Claim. Defendant owes plaintiff for rent of apartment 10 Allston St., Boston, for month ending Oct. 31, 1920, $50, less $30 paid, balance due, $20. Interest on same, Nov. 1, 1920 to Jan. 1, 1921, $.20. Total claim, $20.20."
"Claim. Defendant, on or about Dec. 13, 1920, assaulted and beat plaintiff, damages claimed $35."
"Claim. Defendant, on or about Dec. 28, 1920, converted plaintiff's clock, value $10, and desk, value $20. Total claim $30."

RULE 2. The plaintiff or attorney shall also state to the clerk, the plaintiff's and the defendant's place of residence, usual place of business and place of employment, or such thereof as the clerk may deem necessary, including the street and number, if any; and the clerk shall note the same in the docket. The clerk shall give to the person signing the claim a memorandum of the time and place set for the hearing. Summonses for witnesses, if requested, will be issued by the clerk, without fee.

NOTE TO RULE 2.

(a) For the meaning of "attorney," see Rule 12.

(b) The defendant's place of residence or usual place of business and in some cases the plaintiff's place of residence or usual place of business, must be shown, to determine the venue. G. L. c. 223, §2.

(c) Most defendants have no "place of business." Hanley v. Eastern Steamship Corporation, 221 Mass. 125. Often a notice at the place of employment would be wholly effective. The clerk should use discretion as to the address to which he sends the notice, and if he is in doubt should send notices to more than one address.

(d) The memorandum given to the person signing the claim should state, that if the claim is supported by witnesses, books of account or documents, they should be produced at the hearing; and, also, that in case of an unliquidated claim the amount of damage must be proved by the plaintiff at the hearing whether the defendant defends or not.

RULE 3. The clerk shall mail to the defendant, at one or more of the addresses supplied by the plaintiff, as the clerk may deem necessary or proper, by registered mail, return receipt requested, the expense being prepaid by the plaintiff, a notice signed by the clerk, bearing the seal of the court and bearing teste like a writ, which, after setting forth the name of the court, shall read substantially as follows: —

"To (*here insert name of defendant*)

"(*Here insert name of plaintiff*) asks judgment in this court against you for (*here insert the amount claimed in dollars and cents*) upon the following claim (*here insert the nature of the claim as it*

appears on the docket; but no list of items need be included.)

"The court will give a hearing upon this claim at (*here insert the location of the courthouse and the room therein, as may be necessary*) at (*here insert the hour*) o'clock in the (*here insert "forenoon" or "afternoon" as the case may be*) on (*here insert the date, including the day of the week, as may be prescribed by general or special order of the court.*)

"If you deny the claim, in whole or in part, you must, not later than (*here insert the date, including the day of the week, of the second day before the day set for the hearing*), personally or by attorney state to the clerk, orally or in writing, your full and specific defence to said claim, and you must also appear at the hearing. Unless you do both, judgment may be entered against you by default. If your defence is supported by witnesses, account books, receipts or other documents, you should produce them at the hearing. Summonses for witnesses, if requested, will be issued by the clerk, without fee.

"If you admit the claim, but desire time to pay, you must, not later than (*here insert the date,*

including the day of the week, of the second day before the day set for the hearing), personally or by attorney state to the clerk, orally or in writing, that you desire time to pay, and you must also appear at the hearing and show your reasons for desiring time to pay."

The clerk shall note in the docket the mailing date and address, the date of delivery shown by the return receipt and the name of the addressee or agent signing the receipt.

Notice shall be valid although refused by the defendant and therefore not delivered.

If the notice is returned undelivered, without refusal by the defendant, or if in any other way it appears that notice has not reached the defendant, the clerk shall issue, at the expense of the plaintiff, such other or further notice as the court may order.

NOTE TO RULE 3.

(a) The court should establish hearing days by general order, so that the clerk may set the hearing.

(b) The clerk is expected to use all reasonable means of making the notice effective. In cases of doubt, notice should be sent to more than one address. The docket cards prepared by the Committee on Law and Procedure provide an

easy method of recording the address to which each notice is sent, and the result.

If the usual notice by registered mail fails, the court may order service of a notice by registered mail deliverable to addressee only, or by a sheriff or constable.

(c) Return receipts are not part of the record. Rule 12. The material facts shown by them are to be noted on the docket card. If the clerk desires to keep the return receipts, they may be numbered to correspond with the cases, and kept in any card tray or elsewhere.

RULE 4. A defendant, unless the court shall otherwise order, shall be defaulted unless he shall, personally or by attorney, not later than the second day before the day set for the hearing, state to the clerk, orally or in writing, his defence to the claim. A court sitting in more than one city or town may prescribe by general order other times for stating defences, and may vary the form of notice to the defendant accordingly. The clerk shall enter the substance of the defence in the docket, and the docket entry shall be deemed the answer. The answer shall state fully and specifically, but in concise and untechnical form, what parts of the claim are contested, and the grounds of such contest. Demurrers, dilatory pleas and the answer of general denial are prohibited. No

case shall be deemed ripe for judgment before the time set for the hearing.

NOTE TO RULE 4.

(a) While the English county courts usually require no answer, it is felt to be unjust to require plaintiffs to attend hearings prepared to try claims that will often prove to be undefended. The defence may be stated orally to the clerk, or mailed in season to reach the clerk on the specified day, by the defendant or attorney, so the requirement will not be burdensome. For the meaning of "attorney," see Rule 12.

(b) Demurrers and other technical incidents or results of imperfect pleading have been intentionally avoided. The creation of technical questions of pleading would be undesirable. Yet it is desirable that claims and answers should give ample notice of the real claim or defence.

A party who does not make the fair disclosure required by these rules, risks the imposition of discretionary costs under Rule 9; and that liability seems sufficient.

(c) Suggestions of answers are: —

"Answer. Defendant paid $17 on claim, and owes the balance."

"Answer. Defendant owes for the coat, but the hat was never delivered to him."

"Answer. The part of claim accruing before Jan. 1, 1915 barred by stat. of lim. The later part contracted by wife without authority."

"Answer. Defendant struck plaintiff in self-defence."

"Answer. Plaintiff agreed to do whole job for $15. Did not do workmanlike job. Did not use proper paint."

"Answer. Defendant owes items 1 and 3. Item 2 was not up to sample, and was not merchantable, and was returned by defendant. Item 4 was never ordered, and was returned

by defendant." [This answer is adapted to a case where a list of items is incorporated into the claim.]

RULE 5. The defendant, within the time for answer, may, in the manner provided by Rules 1 and 2, claim any set-off or counterclaim within the jurisdiction of the court in civil cases. Upon the making of such claim by the defendant, the clerk shall give a notice to the plaintiff, at the expense of the defendant, similar to that provided by Rule 3, and shall postpone the hearing of the original claim until the time set for hearing the defendant's claim, and shall notify the parties accordingly. The defendant's claim shall be answered within the time and in the manner provided by Rule 4, and the penalties upon defendants provided by said rule shall apply to plaintiffs in respect to claims by a defendant. The original claim, and the claim of set-off or counterclaim, shall be deemed one case.

NOTE TO RULE 5.

(a) If the plaintiff chooses to adopt this procedure, it is submitted that he adopts it subject to its rules for set-off and counterclaim. See Aldrich v. E. W. Blatchford & Co., 175 Mass. 369. The defendant, seeking to avail himself of this set-off, rather than a set-off of judgments which the courts

have inherent power to allow (Franks v. Edinberg, 185 Mass. 49), can have, it is submitted, no cause to complain if the result happens to be unfavorable.

(b) A set-off or counterclaim may be recorded upon a printed docket card bearing the number of the case with "B" added.

RULE 6. The court may at any time allow any claim or answer to be amended. Interrogatories shall not be filed, nor depositions taken, except by leave of court.

NOTE TO RULE 6.

(a) Amendments may be made without any written motion, and the amendment may be noted on the back of the docket card.

(b) Interrogatories and depositions, if allowed, would delay cases intended to be speedily heard.

RULE 7. Witnesses shall be sworn; but the court shall conduct the hearing in such order and form, and with such methods of proof, as it deems best suited to discover the facts and to determine the justice of the case. If the plaintiff does not appear at any time set for hearing, the court may dismiss the claim for want of prosecution, or enter a finding on the merits for the defendant, or make such other disposition as may be proper.

NOTE TO RULE 7.

(a) See Com. v. Rosenblatt, 219 Mass. 197.

(b) Under small claims procedure, the judge is an investigator, not merely an umpire. He, rather than counsel or parties, is in active charge of the proceedings. To allow hearings to be delayed or postponed on account of engagements of counsel, is contrary to the spirit of the statute, and subversive of the procedure.

(c) Laymen presenting their own cases cannot be expected to comply with all the technical rules of evidence and trials that the desire to prevent prejudice in jury trials has developed. "The greatest and most remarkable offshoot of the jury was that body of excluding rules which chiefly constitute the English 'Law of Evidence.' * * * * Sharply and technically used, these rules enable a man to go far in worrying an inexperienced or ill-prepared adversary, and in supporting a worthless case." Thayer, Preliminary Treatise on Evidence, 180, 528. Only the essential principles of justice in procedure are useful to a judicial investigator without a jury.

(d) Where the plaintiff without cause fails to prosecute his claim, it is believed that the court should have power to enter a judgment on the merits, and end the controversy. See Carpenter etc. v. N. Y., N. H. &. H. R. R. Co., 184 Mass. 98. Kyle v. Reynolds, 211 Mass. 110. This power should not be exercised, however, except to prevent oppression.

RULE 8. No process of mesne attachment shall issue under this procedure, except upon the order of the court. Such order shall state the amount of the attachment and the property or credits to be attached. The form of the process

shall be substantially that required for supplementary process in ordinary civil actions.

RULE 9. The actual cash disbursements of the prevailing party for entry fee, mailing fees, witness fees and officers' fees shall be allowed as costs. No other costs shall be allowed either party, except by special order of the court. The court shall have power in its discretion to award costs, in a sum fixed by the court, not exceeding twenty-five dollars (exclusive of such cash disbursements, or in addition thereto) against any party, whether the prevailing party or not, who has set up a frivolous or vexatious claim or defence, or has made an unfair, insufficient or misleading answer, or has otherwise sought to hamper a party or the court in securing a speedy determination of the claim upon its merits; and to enter judgment and issue execution therefor, or set off such costs against damages or costs, as justice may require.

NOTE TO RULE 9.

The discretionary power to award costs will tend to make justice speedy and efficient, and to prevent intentional delay and trickery. Where the discretionary costs go against the losing party, they will be included in the judgment. Where

they go against the prevailing party, they may be set off, or made the subject of a separate judgment and execution — not a novelty in our law, G. L. c. 261, §§ 3, 22, Wixon v. Marcus, 174 Mass. 67.

RULE 10. The court may order that the judgment shall be paid to the prevailing party, or, if it so order, into court for the use of the prevailing party, at a certain date or by specified instalments, and may stay the issue of execution and other supplementary process during compliance with such order. Such stay shall at all times be subject to being modified or vacated.

NOTE TO RULE 10.

After the hearing on the merits, or after default on the merits, the court may, at the time set for the hearing, consider the question of stay of execution. Often the whole defence, in ordinary civil actions, is caused by a desire to secure a stay of execution; if such stay is authorized it will tend to secure speedy justice without oppression. The court need not feel bound to consider a stay asked by a defaulted defendant who has not asked for a stay according to the terms of the notice to him. Rule 3.

RULE 11. The court may at any time upon motion, and after such notice, by mail or otherwise, as it may order, for cause shown vacate any judgment entered under this procedure, for want of

actual notice to a party, for error, or for any other cause that the court may deem sufficient, and may stay or supersede execution. The court may also order the repayment of anything collected under such judgment, and may enter judgment and issue execution therefor; but no order shall affect the title of any bona fide holder for value under said judgment. Costs in an amount fixed by the court not exceeding twenty-five dollars may be awarded, in the discretion of the court, for or against either party to a motion to vacate judgment, and judgment may be entered and execution may be issued therefor, and any action by the court may be made conditional upon the payment of such costs or the performance of any other proper condition.

NOTE TO RULE 11.

The vacation of judgment "on motion," i. e. by application in the same case, is much more simple than existing methods. No writing is required, only an entry in the docket. Rule 12. Proceedings upon such a motion may be recorded upon an unprinted docket card, bearing the number of the case with "C" added.

This rule covers the cases within the scope of motions and petitions to vacate judgment, and writs and bills of review. See G. L. c. 250. While broad and simple, the provision for discretionary costs will prevent its abuse.

This rule does not prevent the court from correcting its record, of its own motion, under its inherent power, to conform to the truth. Karrick v. Wetmore, 210 Mass. 578. Hathaway v. Congregation Ohab Shalom, 216 Mass. 539. Waucantuck Mills v. Magee Carpet Co., 225 Mass. 31. Wetmore v. Karrick, 205 U. S. 141.

RULE 12. The docket shall consist of cards, envelopes or folders, and such other documents as may be incorporated therein by reference. Nothing shall be deemed part of the record except the docket entries. Any written papers delivered to the clerk shall be merely authority for the clerk to enter the substance thereof on the docket, and such papers need not be filed or preserved. The word "clerk" in these rules shall include an assistant clerk. The word "attorney" in these rules shall mean an attorney at law, a person specially authorized in writing to prosecute or defend the claim, one of a number of partners or joint plaintiffs acting for all, or an officer, manager or local manager of a corporation acting for it. Notice to such attorney for a party shall be equivalent to notice to such party.

NOTE TO RULE 12.

(a) The accumulation of a mass of claims, answers, motions, letters and other papers, drawn by the parties, would

be a nuisance. Even the return receipt does not become part of the docket or record. A list of items becomes part of the docket and record only when incorporated into the claim by reference, as, e. g. "See list of items filed." To file nothing permanently except a single docket card is an ideal to be attained when practicable.

(b) The use of the 5×8 printed docket cards prepared by the Committee on Law and Procedure and printed by the Library Bureau, 43 Federal Street, Boston, is recommended. These cards are printed from plates owned by the Association of Justices of District Courts. The name of the particular court ordering cards is printed in the margin. Filing envelopes, 5×8, to be numbered like the docket cards, for the temporary or permanent filing of lists of items, etc., are also useful. Filing devices for such cards and envelopes are readily procurable.

(c) In small courts the docket cards themselves, filed with any accompanying envelopes by the names of the defendants, may constitute a sufficient index. In larger courts the docket cards and any accompanying envelopes would better be filed and numbered chronologically, with a card index for plaintiffs and defendants.

RULE 13. The venue shall be the same as in ordinary civil actions. Rules of practice in ordinary civil actions, which are applicable to this procedure and not inconsistent with these rules, shall apply to cases under this procedure.

RULE 14. Upon removal of a cause to the superior court, the original docket entries, or, in

case of removal by some of several defendants, an attested copy thereof, shall be transmitted to the clerk of the superior court.

RULE 15. In actions of contract or tort, other than slander and libel, hereafter begun by writ, in which the recovery of debt or damages does not exceed thirty-five dollars, no costs other than the taxable cash disbursements shall be recovered by the plaintiff, except by special order of the court for cause shown.

Common Law Rules

Rule VI of the Common Law Rules, adopted in 1911, is hereby amended so as to read as follows:—

RULE VI.

The time allowed for the entry of actions of summary process for the possession of land shall be from nine o'clock until thirty minutes after nine o'clock in the forenoon, and for the entry of appearances and the filing of pleas and answers in abatement, demurrers, motions to dismiss, answers and applications for a stay of judgment and execution therein, until ten o'clock in the forenoon, on the return day, unless the court shall otherwise order. If no answer, plea, demurrer or motion to dismiss is filed within the time so allowed, a default shall be recorded, unless the court shall otherwise order. Such actions shall be in order for trial on the return day, unless otherwise ordered. Judgment in such actions shall be entered at ten o'clock in the forenoon on the day after they become ripe for judgment.

Rule XIV.

Judgment in civil actions and proceedings ripe for judgment, except actions of summary process for the possession of land, shall be entered at ten o'clock in the forenoon on Friday of each week, but if a legal holiday occurs on Friday, at ten o'clock in the forenoon of the Thursday preceding; unless the court in a particular case otherwise orders. When there is an appeal from the taxation of costs, judgment shall not be entered, except as provided in section twenty-one of chapter two-hundred and sixty-one of the General Laws, until the costs are finally taxed and allowed. When actions are brought against parties severally liable upon written contracts, and some of the defendants are defaulted and others appear, the court may enter judgment and issue execution against the parties defaulted as if they had been the sole defendants; and the case shall go forward against the parties appearing as in other contested cases.

NOTE ON ENTRY OF JUDGMENT.

G. L. c. 235, §3 provides: — "District courts may by rule establish the time for the entry of judgment in actions of summary process under chapter two hundred and thirty-nine which are ripe for judgment."

Judgment in other actions is governed by G. L. c. 235, §2, which reads: — "Judgment in civil actions and proceedings ripe for judgment in district courts shall be entered at ten o'clock in the forenoon on Friday of each week, but if a legal holiday occurs on Friday, at ten o'clock in the forenoon of the Thursday preceding; or it may be entered at any time in a case ripe for judgment upon notice and motion."

A case is ripe for judgment when the liability is fixed and the damages are assessed, although certain motions, undisposed of, remain on file. Dalton-Ingersoll Co. v. Fiske, 175 Mass. 15. But not where there remains a suggestion of bankruptcy, and a motion for a stay (American Wood Working Machinery Co. v. Furbush, 193 Mass. 455); or a motion for a continuance based upon the summoning of the defendant as trustee of the plaintiff (Gilchrist v. Cowley, 181 Mass. 290); or a motion to remove a default, at least if brought to the attention of the court and not merely filed (Dunbar v. Baker, 104 Mass. 211, Norcross v. Crabtree, 161 Mass. 55, Gilchrist v. Cowley, 181 Mass. 290, Dalton-Ingersoll Co. v. Fiske, 175 Mass. 15); or a trustee undisposed of. Gifford v. Rockett, 119 Mass. 71, Jarvis v. Mitchell, 99 Mass. 530. See also Burnham v. Haskell, 213 Mass. 386, and Snow v. Dyer, 178 Mass. 393, 396, in the latter of which it is said that judgment may be postponed by order of the court. For other cases construing the words, "ripe for judgment," see Weil v. Boston Elevated Ry. Co., 216 Mass. 545, and cases cited; Real Property Co. Inc., v. Pitt, 230 Mass. 526.

Theoretically the entry of judgment is a judicial act of the highest character. At common law, judgment in civil cases was entered on motion, just as sentences in criminal cases are still imposed in the superior court on motion. Goddard v. Coffin, 2 Ware (Daveis ed.) 382, s. c. Fed. Cases, No. 5490. Sawtell, petr., 6 Pick. 110. Gardner v. Butler, 193 Mass.

96, 99. Coolidge v. Cary, 14 Mass. 115. G. L. c. 235, §1, relative to the S. J. C.

In Herring v. Polley, 8 Mass. 113, 119, the Massachusetts practice was thus stated, "A judgment may be entered on motion during the term, in which case the time of entering it is minuted; but when no day is minuted when judgment is entered, by the ancient usage of this court, and also of the common pleas, judgment is entered on the last day of the term, against the presumption of the common law. Formerly, on the last day of each term, an order was passed to enter judgment, where the party was entitled to judgment, and to continue all actions undetermined. But of late years this order has become a standing rule and practice of the court." This practice continued as long as terms existed. Blanchard v. Ferdinand, 132 Mass. 389. Pierce v. Lamper, 141 Mass. 20. P. S. c. 171, §1. For the right to enter judgments nunc pro tunc, see Perkins v. Perkins, 225 Mass. 392.

After terms were abolished in 1885, the rules of the superior court made the following provision; "On the first Monday of every month judgment may be entered, in all actions ripe for judgment, under a general order of the court; and the court, or any justice, may at other times order judgment to be entered in any action." This practice of entering judgment as of course on the first Monday of each month was reinforced by R. L. c. 177, §1 and G. L. c. 235, §1. In district courts a similar provision for entering judgment on Friday at 10 A. M. was made by St. 1897, c. 431, now G. L. c. 235, §2.

Under all these changing practices, the principle has been maintained that the judgment is deemed in law to have been entered when it ought to have been entered, regardless of the action or inaction of the clerk. Where the clerk wrongly made a record of judgment too soon, his act was said to be "immaterial." Wallace v. Boston Elevated Railway Co.,

194 Mass. 328. American Wood Working Machinery Co. v. Furbush, 193 Mass. 455. Cf. Hathaway v. Congregation Ohab Shalom, 216 Mass. 539. On the other hand, it has been held that a case ripe for judgment goes to judgment in law at the time prescribed by rule or order, although no record is made on the docket. Gardner v. Dudley, 12 Gray 430. Pierce v. Lamper, 141 Mass. 20. Davis v. National Life Ins. Co., 187 Mass. 468. Wallace v. Boston Elevated Railway Co., 194 Mass. 328. Boston Bar Association v. Casey, 204 Mass. 331, s. c. 227 Mass. 46, 51. Karrick v. Wetmore, 210 Mass. 578. Shawmut Commercial Paper Co. v. Cram, 212 Mass. 108. Warner v. Pittsfield, 231 Mass. 138.

Both G. L. c. 235, §1 and §2 read as though they were self-executing, and render unnecessary any order by the court. Yet, as the entry of judgment is a judicial act, a rule or order of the court may be a prerequisite. In some of the cases cited, the automatic entry of judgment has been rested upon Superior Court Common Law Rule 57, as well as on the statute; while in Gardner v. Butler, 193 Mass. 96, where the statute was unaided by rule, no automatic entry of judgment took place. The first sentence of Rule XIV, supra, is intended to bring the practice into accord with that of the superior court in this respect. One result will be to fix the time of taking an appeal. Gardner v. Dudley, 12 Gray 430. Stevenson v. Donnelly, 221 Mass. 161.

A troublesome incident of the entry of judgment is the taxation of costs, under G. L. c. 261, §§19–22. The damages and costs constitute a single judgment (Many v. Sizer, 6 Gray, 141, Davis v. Ferguson, 148 Mass. 603, Snow v. Dyer, 178 Mass. 393), but a case may go to judgment although the costs have not actually been taxed. Under the practice prior to 1836, an appeal to the court from the taxation of costs by the clerk did not affect the date of judgment; only the execution

was suspended, until the amount of the costs included in the judgment should be reaffirmed or corrected. Davis v. Ferguson, 148 Mass. 603, 604. By R. S. c. 121, §29 it was provided that in case of an appeal from the taxation of costs "the judgment shall be considered as rendered on the day when the costs are finally taxed and allowed," except when a bond is given. Melvin v. Bird, 131 Mass. 561, 565. Davis v. Ferguson, 148 Mass. 603. P. S. c. 198, §25, amended by St. 1882 c. 235. But that provision was erroneously considered by the commissioners who prepared the Revised Laws to have been repealed by implication by the statute of 1885, abolishing terms, and was expressly repealed by the Revised Laws of 1902. Since 1902, the practice existing prior to 1836 appears to have been reinstated, until changed by Common Law Rule 62 of the Superior Court, first adopted Oct. 21, 1911. The second sentence of Rule XIV, supra, is intended to bring the practice in the district courts into substantial conformity with that in the superior court, and with R. S. c. 121, §29.

As to the last sentence of Rule XIV, supra, see Common Law rule 57 of the Superior Court, G. L. c. 231, §§ 2, 4, 97, 105

Supreme Judicial Court Rule

(APPLICABLE TO ALL COURTS)

At the Supreme Judicial Court holden at Boston in and for said Commonwealth on the first day of March in the year of our Lord one thousand nine hundred and fifteen, it is —

Ordered, By the Justices of the Supreme Judicial Court that, in view of Statute 1914, chapter 54, entitled "An Act Relative to the Return of Executions," and Statute 1914, chapter 429, entitled "An Act Relative to Arrest and Examination on Civil Process," and by virtue of the authority conferred by section 22 of chapter 177 of the Revised Laws, the form of alias and successive executions to be used in all courts of the Commonwealth be altered in form as follows:

After the words,

"We command you, therefore,"

let there be inserted the words,

"as we have before commanded you."

The final clause shall be in the form following; to wit:

"Hereof fail not, and make return of this writ with your doings thereon into the clerk's office of our said Court at within our county of within five years from the date hereof, or within ten days after this writ is satisfied in whole or discharged by law."

This order shall take effect on the first day of April, 1915; but no execution shall be invalid which conforms in substance to the form here established.

NOTE. See G. L. c. 235, §§17, 22; c. 224, §10.

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